Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit upheld grand jury subpoenas and contempt citations seeking to compel TIME magazine reporter Matthew Cooper and Time Inc. to reveal confidential source information regarding an alleged leak by government officials identifying Valerie Plame as a CIA operative.

Reflecting the conflict and confusion over whether the courts should recognize a reporter's confidential source privilege under Federal Rule of Evidence 501—or whether they even have the power to do so in light of this Court's decision in *Branzburg v. Hayes*—the three panel members below offered three different analyses of these issues, while agreeing that *Branzburg* precluded them from recognizing a First Amendment-based privilege.

The panel ultimately declined to quash the subpoenas based on information contained in secret evidence submitted by the prosecutor and considered *ex parte*.

The following questions are presented:

1. Whether a reporter's privilege exists under Federal Rule of Evidence 501 and the common law, or under the First Amendment, that provides protection against compelled disclosure of confidential source information.

2. Whether the Due Process Clause provides protection against imprisonment or fines for contempt based on secret evidence presented *ex parte* by a prosecutor.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the consolidated proceeding below included Matthew Cooper, Time Inc., Judith Miller, and the United States of America.

Time Inc., the publisher of TIME magazine, is wholly owned by Time Warner Inc., a public company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. THE QUESTION WHETHER A FEDERAL REPORTER'S PRIVILEGE EXISTS IS IMPORTANT, RECURRING, HAS DIVIDED THE CIRCUITS, AND WARRANTS REVIEW. 10

A. This Court Should Resolve The Conflicts And Recognize A Common Law Privilege. 13

1. The Circuits Have Adopted Inconsistent And Conflicting Approaches To A Common Law Reporter's Privilege. 14

2. *Jaffee* And Rule 501 Support The Recognition Of A Common Law Privilege. 16

3. This Court Should Grant Review To Resolve The Tension Between *Branzburg* And *Jaffee*. 20

B. This Court Should Resolve The Conflicts And Clarify *Branzburg* By Recognizing That The First Amendment Provides Protection For Confidential News Sources. 21

1. Courts Have Divided Over The Meaning Of *Branzburg* And The Scope Of A First Amendment Privilege. 21

2. This Court's Recent First Amendment Decisions Call *Branzburg* Into Question And Support Recognition Of A Privilege. 23

C. The Existence Of A Reporter's Privilege Is A Recurring Issue Of Substantial Public Importance. 25

II. REVIEW IS WARRANTED TO RESOLVE WHETHER DUE PROCESS PROHIBITS IMPRISONING OR FINING WITNESSES BASED ON SECRET EVIDENCE. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Pages

CASES

Bartnicki v. Vopper, 532 U.S. 514 (2001) 24

Branzburg v. Hayes, 408 U.S. 665 (1972) ..... *passim*

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) 16

Butterworth v. Smith, 494 U.S. 624 (1990) 29

Cervantes v. Time Inc., 464 F.2d 986 (8th Cir. 1972) 22

Estes v. Texas, 381 U.S. 532 (1965) 18

Funk v. United States, 290 U.S. 371 (1933) 14

Gonzales v. National Broadcasting Co., 194 F.3d 29 (2d Cir. 1999) 15, 23

Greene v. McElroy, 360 U.S. 474 (1959) 27

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 27, 28

In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993) 12, 15, 22

In re Grand Jury Proceedings, 810 F.2d 580 (6th Cir. 1987) 23

In re Grand Jury Subpoena to Williams, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) 12, 14, 21

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) 29

In re Kitchen, 706 F.2d 1266 (2d Cir. 1983) 28, 29

In re Letellier, 578 A.2d 722 (Me. 1990) 21

In re Motions of Dow Jones & Co.,
142 F.3d 496 (D.C. Cir. 1998) 29

In re Oliver, 333 U.S. 257 (1948) 27

In re Pennington, 581 P.2d 812 (Kan. 1978) 22

In re Shain, 978 F.2d 850 (4th Cir. 1992) 22

Jaffee v. Redmond, 518 U.S. 1 (1996) ..... *passim*

LaRouche v. National Broad. Co.,
780 F.2d 1134 (4th Cir. 1986) 22

McKevitt v. Pallasch, 339 F.3d 530
(7th Cir. 2003) 11, 12, 23

McKoy v. North Carolina, 494 U.S. 433 (1990) 24

Miller v. Transamerican Press, Inc.,
621 F.2d 721 (5th Cir. 1980) 22

Mills v. Alabama, 384 U.S. 214 (1966) 25

New Hampshire v. Siel, 444 A.2d 499
(N.H. 1982) 22

New York Times Co. v. Gonzales, No. 04-7677,
2005 WL 427911 (S.D.N.Y. Mar. 2, 2005) ..... *passim*

New York Times Co. v. Sullivan, 376 U.S. 254
(1964) 25

Riley v. City of Chester, 612 F.2d 708
(3d Cir. 1979) 14, 16, 22

*Rodriguez de Quijas v. Shearson/American
Express, Inc.*, 490 U.S. 477 (1989) 25

Schoen v. Schoen, 5 F.3d 1289 (9th Cir. 1993) 22

Silkwood v. Kerr-McGee Corp., 563 F.2d 433
(10th Cir. 1977) 22

State Oil Co. v. Khan, 522 U.S. 3 (1997) 24

Swidler & Berlin v. United States,
524 U.S. 399 (1998) 19

Time Inc. v. Hill, 385 U.S. 374 (1967) 18

Trammel v. United States, 445 U.S. 40 (1980) ..... *passim*

Turner Broadcasting System v. FCC,
512 U.S. 622 (1994) 24

United States v. Alter, 482 F.2d 1016
(9th Cir. 1973) 28, 29

United States v. Calandra, 414 U.S. 338 (1973) 16

United States v. Caporale, 806 F.2d 1487
(11th Cir. 1986) 22

United States v. Cuthbertson, 630 F.2d 139
(3d Cir. 1980) ..... *passim*

United States v. LaRouche Campaign, 841 F.2d
1176 (1st Cir. 1988) 16

United States v. Moussaoui, 382 F.3d 453
(4th Cir. 2004) 29

United States v. Smith, 135 F.3d 963
(5th Cir. 1998) 12, 22

United States v. Steelhammer, 539 F.2d 373
(4th Cir. 1976), *rev'd*, 561 F.2d 539
(4th Cir. 1977) (en banc) 15

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) 19, 23

CONSTITUTIONAL PROVISIONS

U.S. CONST., AMEND. I ..... *passim*

U.S. CONST., AMEND. V ..... *passim*

STATUTES

18 U.S.C. App. III § 3 29

28 U.S.C. § 1254(1) 1

50 U.S.C. § 421 3

D.C. Code Ann. §§ 16-4701 *et seq* 17, 26

RULES

FED. R. EVID. 501 ..... *passim*

FED. R. EVID. 1101 ..... 16, 23

OTHER AUTHORITIES

A. Bickel, *The Morality of Consent* (1975) 18

Matthew Cooper *et al.*, *A War on Wilson?*, Time.com (July 17, 2003) 2, 3, 25

Michael Duffy *et al.*, *A Question of Trust*, TIME (July 21, 2003) 3

Robert Novak, *The Mission to Niger*, Chi. Sun-Times, July 14, 2003 2

Reporters' Committee for Freedom of the Press, *Special Report: Reporters and Federal Subpoenas*, March 2005 10

R. Smolkin, *Under Fire*, 27 Am. Journalism Review 18 (2005) 26

Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975) 12

John W. Strong, *McCormick on Evidence* § 76.2 (5th ed. 1999) 24

Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. Times, July 6, 2003 2

PETITION FOR A WRIT OF CERTIORARI

Petitioners Matthew Cooper and Time Inc. ("Time") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The D.C. Circuit's opinion (Pet. App. 1a) is reported at 397 F.3d 964, and its order denying rehearing en banc (Pet. App. 116a) is reported at ___ F.3d ___, 2005 WL 889719. Orders of the district court are reported at 332 F. Supp. 2d 26 (Pet. App. 86a), 332 F. Supp. 2d 33 (Pet. App. 98a), 338 F. Supp. 2d 16 (Pet. App. 101a), and 346 F. Supp. 2d 54 (Pet. App. 111a).

JURISDICTION

The D.C. Circuit filed its opinion on February 15, 2005, and denied petitioners' timely request for rehearing en banc on April 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 501 provides: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fifth Amendment's Due Process Clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents important, substantial and recurring questions concerning the reporter's privilege that have confused and divided courts throughout the country since this Court's 5-4 decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), more than thirty years ago.

1. In the summer of 2003, a public controversy arose over the justification for the invasion of Iraq, including whether Iraq possessed, or had been seeking to develop, weapons of mass destruction. In the midst of that controversy, on July 6, 2003, the *New York Times* published an op-ed piece by former Ambassador Joseph Wilson challenging the Bush Administration's justifications for the invasion. Wilson asserted that the CIA had dispatched him to Niger in February 2002 to investigate whether Iraq had attempted to purchase uranium from Niger as part of its effort to develop nuclear weapons. He stated that he had found no credible evidence of such efforts, and had reported that conclusion to the CIA. *See* Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

On July 14, 2003, the *Chicago Sun-Times* published a column by Robert Novak reporting that "two senior administration officials" had told him that the CIA had selected Wilson for the Niger mission at the suggestion of Wilson's wife, Valerie Plame, described by Novak as "an agency operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

Three days later, TIME magazine published an article on its website, co-authored by reporter Matthew Cooper, stating that "some government officials have noted to TIME in interviews . . . that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction." Matthew Cooper *et al.*, *A War on Wilson?*, TIME.com (July 17, 2003), available at www.time.com/time/nation/article/0,8599,465270,00.html. The article, based in part on confidential sources, suggested potential misconduct by government officials in that the leak may have been made to re-

taliate against and discredit Wilson for his op-ed in the *Times*. Cooper later contributed reporting to a second article, also based in part on confidential sources, that reported on the Iraq/uranium controversy but did not mention Plame. Michael Duffy *et al.*, *A Question of Trust*, TIME, July 21, 2003, at 22.

2. The Department of Justice opened an investigation into whether the leak of Plame's identity to the media violated federal law barring certain unauthorized disclosures of the identity of covert operatives. *See* 50 U.S.C. § 421 (criminalizing the intentional and knowing disclosure of information identifying a covert agent by anyone having authorized access to classified information, with knowledge that the United States is taking affirmative measures to conceal that covert agent's intelligence relationship to the United States). In December 2003, the Attorney General recused himself from that investigation and delegated that responsibility to the Deputy Attorney General. The Deputy Attorney General, in turn, appointed Patrick Fitzgerald as Special Counsel and delegated to him the full authority of the Attorney General over the investigation.

The Special Counsel convened a grand jury in January 2004, and on May 21, 2004, issued a grand jury subpoena to Cooper seeking his testimony and production of "[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled, 'A War on Wilson?' and the July 21, 2003 Time magazine article entitled, 'A Question of Trust.'" A21.[1]

3. Cooper moved to quash the subpoena, invoking a reporter's privilege under the common law and First Amendment, and arguing that the subpoena sought to force him to reveal the identity of his confidential source or sources and other information provided in confidence. A61. In an affidavit he stated that his ability to obtain and report informa-

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1 "A" refers to the Appendix filed in the D.C. Circuit.

tion to the public depended in large part on his ability "to promise confidentiality to [his] sources." Pet. App. 126a.

In a July 20, 2004 opinion, the district court denied Cooper's motion, concluding that *Branzburg* "rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith." Pet. App. 86a. The court also stated that the Special Counsel "would be able to meet even the most stringent of balancing tests," based solely on an affidavit that the Special Counsel had submitted *ex parte* and under seal. Pet. App. 97a. The Special Counsel refused to share the affidavit with Cooper or his counsel, and the district court denied Cooper's request that he or his counsel be permitted to review it.

The Special Counsel had served a substantially similar subpoena on Time, requesting the same documents sought from Cooper. Time moved to quash, and the district court denied Time's motion on August 6, 2004.

Cooper and Time informed the Special Counsel that they would decline to comply with the subpoenas insofar as they sought testimony or documents that would identify confidential sources. On August 9, 2004, the court issued an order holding Cooper and Time in contempt. Pet. App. 98a. The court directed that Cooper be imprisoned for up to 18 months, and that Time pay a fine of $1,000 per day, until they complied with the subpoenas. *Id.* at 100a.

Cooper and Time noticed appeals, but shortly thereafter reached an agreement with the Special Counsel whereby Time agreed to produce certain documents and Cooper agreed to answer certain questions pertaining to his conversations with a particular individual. (Cooper and Time reached this agreement only after that individual had explicitly and unambiguously informed Cooper that he had no objection to Cooper identifying him.) On August 23, 2004, Cooper answered all questions from the Special Counsel in a deposition and Time produced the documents. On the Special Counsel's motion, the district court then vacated the contempt orders.

4. Less than three weeks later, the Special Counsel served a second round of subpoenas on Cooper and Time. These subpoenas were broader than the initial subpoenas, and sought all documents "reflecting conversations between Matthew Cooper and official source(s) prior to July 14, 2003" relating to Wilson, Plame, or her affiliation with the CIA—whether or not those documents related to the two articles in question. A314-15. Cooper and Time again moved to quash based on the reporter's privilege. On October 7, 2004, the district court denied the motions and ordered Cooper and Time to comply.[2]

Cooper and Time advised the Special Counsel that they would not comply insofar as the subpoenas sought information that would divulge the identity of confidential sources. On October 13, 2004, the court held Cooper and Time in contempt and once again ordered Cooper to be imprisoned up to 18 months, and Time to be fined $1,000 per day, until they complied with the subpoenas. The court adhered to its earlier ruling, holding that *Branzburg* foreclosed any claim of privilege, either under the First Amendment or federal common law. Finding that Cooper's and Time's appeals "are brought in good faith and raise substantial issues of law," the court granted Cooper bail and stayed the fine imposed on Time pending appeal. Pet. App. 109a.

5. The Special Counsel was simultaneously seeking to force disclosure of confidential source information from *New York Times* reporter Judith Miller.[3] The grand jury subpoenas issued to Miller on August 12 and 14, 2004, demanded her confidential source information relating to Valerie Plame or Iraqi efforts to obtain uranium. As with Cooper and Time,

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[2] On November 10, 2004, the district court issued an opinion explaining that the motion was denied for the reasons given in the July 20, 2004 and September 9, 2004 orders, among other reasons. Pet. App. 111a.

[3] The Special Counsel also caused grand jury subpoenas to be issued to several other reporters in connection with this investigation, including Tim Russert of NBC and Walter Pincus and Glenn Kessler of the *Washington Post*.

the district court rejected Miller's reporter's privilege claims and denied her motion to quash. In a September 9, 2004 order, the court adopted and relied upon the reasoning of its July 20, 2004 order in rejecting the privilege. Pet. App. 101a. The court included a more detailed explanation of its reasons for rejecting a common law privilege, concluding that because the *Branzburg* Court supposedly "undertook the analysis" in 1972 and did not recognize a common law privilege, the district court was foreclosed from doing so today. Pet. App. 105a.

As with Cooper and Time, the court held Miller in contempt and ordered her to be jailed when she refused to comply with the subpoenas. The court granted bail to Miller, specifically finding that an appeal would be brought in good faith and would raise substantial issues of law.

6. Cooper, Time, and Miller brought a consolidated appeal. A panel of the D.C. Circuit, composed of Judges Sentelle, Henderson and Tatel, affirmed. Pet. App. 2a. The court interpreted *Branzburg* as an absolute bar to any First Amendment protection for confidential sources, rejected decisions from other circuits that have recognized a First Amendment privilege, and held that because "[t]he Supreme Court has not overruled *Branzburg*," it "has already decided the First Amendment issue before us today." Pet. App. 10a, 16a. Only the Supreme Court has "the prerogative of overruling its own decisions." Pet. App. 16a (quotation omitted).

The panel could not reach a similar consensus on whether a reporter's privilege existed as a matter of federal common law, splintering three ways in separate concurrences totaling 60 pages. Judge Sentelle stated that, in his opinion, *Branzburg* rejected a common law privilege and "that rejection stands unless and until the Supreme Court itself" clarifies or overrules *Branzburg*. Pet. App. 26a.

Judge Henderson stated that "I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question" whether a common law privilege exists. Pet. App. 38a. She noted that this Court's opinion in

Branzburg, as well as Justice Powell's concurrence, "hint ambiguously at the existence" of a common law privilege, and emphasized that "we are not bound by *Branzburg*'s commentary on the state of the common law in 1972." *Id.* at 38a-39a. Nonetheless, she concluded that because the Special Counsel's *ex parte* "evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," the court "need not, and therefore should not, decide anything more today than that." *Id.* at 35a.

Judge Tatel disagreed with both Judge Sentelle and Judge Henderson. He explained that he found *Branzburg* "more ambiguous than do my colleagues" and stated that he would recognize a common law privilege, rejecting the district court's and Judge Sentelle's argument that "*Branzburg* already performed the analysis required by Rule 501" of the Federal Rules of Evidence. Pet. App. 45a, 58a. Judge Tatel noted "the shift in favor of the privilege since [*Branzburg* was decided]—from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection," and concluded that "[t]o disregard this modern consensus in favor of decades-old views . . . would not only imperil vital newsgathering, but also shrink the common law function assigned by Rule 501 and 'freeze the law of privilege' contrary to Congress's wishes." *Id.* at 59a, 62a (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). He set forth his formulation of the reporter's privilege, and concluded that it would be overcome in this case, based solely on the prosecutor's *ex parte* submission. Pet. App. 62a-83a.

The panel as a whole noted the differing views of each panel member as to the existence and scope of a common law privilege, but concluded that "if [a common law] privilege applies here, it has been overcome" by the Special Counsel's secret evidentiary proffer. Pet. App. 16a. The panel stated that on this point it was adopting the reasoning of Judge Tatel's concurring opinion, which devoted eight pages to explaining how the Special Counsel, with his "voluminous classified filings," had "met his burden of demonstrating that

the information [sought from the reporters] is both critical and unobtainable from any other source." Pet. App. 16a, 75a. Those eight pages, as released to petitioners and to the public, are blank. Pet. App. 76a-82a.

Finally, the court held that Cooper's and Time's due process rights had not been violated by "the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions." Pet. App. 17a. The court concluded that the government's interest in grand jury secrecy outweighed any rights an alleged contemnor may have to respond to the evidence purporting to defeat a claim of privilege. *Id.* at 17a-18a.[4]

With two of the nine active judges not participating, the court of appeals denied rehearing en banc. Pet. App. 116a-117a. Judge Tatel issued a separate statement concurring in the denial, acknowledging that "this court's decisions concerning [*Branzburg*] are somewhat conflicted," but concluding that "[o]nly the Supreme Court can limit or distinguish *Branzburg* on these facts," and that no other issue warranted the full court's review. Pet. App. 118a-119a.

REASONS FOR GRANTING THE WRIT

The four separate opinions issued by the D.C. Circuit's three-judge panel are a microcosm of the law in this area, which is undeniably in serious disarray. This Court's guidance is necessary to determine the existence and scope of a reporter's privilege under the common law and the First Amendment.

This Court has not considered the issue whether federal law provides protection for confidential sources since its sharply divided and perplexing decision more than 30 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Since that time, the *Branzburg* majority opinion and Justice Powell's

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[4] The court also rejected petitioners' arguments that the Department of Justice Guidelines for issuing subpoenas to reporters, 28 C.F.R. § 50.10, were judicially enforceable and thus declined to reach the issue whether the Special Counsel had complied with them. Pet. App. 20a.

"enigmatic" concurrence have been subject to sharply differing interpretations. The courts of appeals have been vexed by whether there is any common law or constitutional privilege at all, and how to apply the privilege in varying contexts. Some courts have found *Branzburg* to bar recognition of a privilege, while many have read the collection of opinions affirmatively to support it, and still others have held that the privilege applies in some proceedings but not others.

The intervening three decades have witnessed significant changes in the legal landscape that strongly support recognition of a federal reporter's privilege. In 1975, Congress adopted Federal Rule of Evidence 501, instructing federal courts to recognize new privileges as appropriate in light of "reason and experience." In embracing this flexible approach, Congress declined to adopt the privilege rule originally promulgated by this Court—which had set forth nine specific, enumerated privileges—in favor of an open-ended grant of lawmaking authority that "directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (quoting *Trammel*, 445 U.S. at 47).

Moreover, at the time *Branzburg* was decided—in the pre-Watergate era—only 17 States recognized a reporter's privilege. Today, 49 States and the District of Columbia do. This fact is highly relevant to the question whether a federal common law privilege should be recognized under Rule 501. As this Court held in *Jaffee*, which itself was decided more than 20 years after *Branzburg*, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." 518 U.S. at 9.

The sharp disagreements among the lower courts, and the many changes in the law over the last 30 years, have resulted in inconsistent and conflicting legal standards throughout the country. This uncertainty, in turn, frustrates and defeats the nearly unanimous policies of the States in this area. It also leads to confusion by sources and reporters, and the specter of jail and other harsh penalties for reporters who

do not know what promises they can make to their sources when engaged in newsgathering.

Confidential sources are critical to reporting on matters of public importance. This case, for example, involves a news story about the validity of the government's justification for war in Iraq, and alleged misconduct by senior officials aimed at discrediting critics of the war. Yet in recent months there has been a wave of reporters being subpoenaed and held in contempt for declining to reveal their sources. For example, a Rhode Island television reporter was held in civil and criminal contempt for refusing to disclose to a grand jury the source of a leak, and five reporters were held in contempt in connection with the Wen Ho Lee civil case. *See* Reporters' Committee for Freedom of the Press, *Special Report: Reporters and Federal Subpoenas*, March 2005, available at www.rcfp.org/shields_and_subpoenas.html.

As the panel in this case recognized, only this Court can resolve the reigning conflict and confusion among the federal courts regarding *Branzburg* and the existence and scope of a reporter's privilege. The Court should grant review and do so in this case.

The Court should also grant review to resolve the important due process questions presented by the lower courts' reliance on the prosecutor's *ex parte* submissions in holding Cooper and Time in contempt. The D.C. Circuit's holding—that a witness may be imprisoned based on secret evidence—conflicts with rulings from the Second and Ninth Circuits, as well as decisions of this Court recognizing the due process right of defendants to review and challenge the evidence against them.

I. THE QUESTION WHETHER A FEDERAL REPORTER'S PRIVILEGE EXISTS IS IMPORTANT, RECURRING, HAS DIVIDED THE CIRCUITS, AND WARRANTS REVIEW.

In *Branzburg*, this Court, by a 5-4 vote, declined to recognize a reporter's privilege under the First Amendment in a

case involving reporters subpoenaed by a grand jury. The Court, in an opinion authored by Justice White, recognized that "news gathering is not without its First Amendment protections," 408 U.S. at 707, but went on to reject protection in that case. Although the Court noted that, as of 1972, no privilege had been recognized "[a]t common law," it obviously could not have resolved the question whether such a privilege should be recognized under Rule 501, which would not be enacted for another three years. *Id.* at 685-86, 693. In fact, the Court specifically observed that "[a]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* at 706. The Court emphasized that its analysis was based "[o]n the records now before us" at a time when "the majority" of States had not "provided newsmen a statutory privilege." *Id.* at 689-90.

In a concurring opinion, however, Justice Powell—whose vote was essential to the judgment—seemed to endorse some form of privilege by recommending "the striking of a proper balance between freedom of the press" and the needs of law enforcement. 408 U.S. at 710. Justice Stewart's dissent described Justice Powell's opinion as "enigmatic," *id.* at 725, and the lower courts are deeply split over whether it should be construed to limit—or even replace—the majority's holding, compounding the confusion over *Branzburg*'s meaning and scope. *See, e.g.*, *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003) ("[s]ince the [four] dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion . . ., maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White's 'majority' opinion"). Some courts and commentators have even gone so far as to label Justice White's opinion in *Branzburg* a "plural-

ity," while others have noted that Justice Powell joined that opinion despite writing a concurrence that seemed to question its fundamental conceptual underpinnings.[5] As Justice Stewart wrote three years after *Branzburg*, "the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half." Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975).

Branzburg ignited a remarkable 33-year nationwide judicial debate that is ripe for this Court's resolution. What Judge Tatel termed the "internal confusion" of *Branzburg*, Pet. App. 47a, has resulted in courts taking wildly diverging approaches to the reporter's privilege. Many courts have recognized a common law privilege and, in some cases, a First Amendment privilege in the criminal context despite *Branzburg*. *See, e.g., In re Grand Jury Subpoena to Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc). Other courts have reached the opposite conclusion, agreeing with Judge Sentelle's view that *Branzburg* forecloses a common law privilege as well as a First Amendment privilege. *See, e.g., In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993). Still other courts have recognized the privilege in the civil context, while rejecting it in the criminal context.

Judge Posner recently surveyed the confused state of the law in *McKevitt v. Pallasch*, where he noted that "[a] large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope." 339 F.3d at 532. At the same time,

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[5] The confusion generated by Justice Powell's concurrence has persisted for more than three decades now, and shows no signs of abating, as courts cannot agree on Justice Powell's exact position, and how (if at all) it modifies Justice White's opinion for the Court. *Compare, e.g., United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998) ("we have previously construed *Branzburg* as a plurality opinion") with *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) ("It is important to note that [*Branzburg*] is *not* a plurality opinion.").

other courts "refuse to recognize the privilege, at least in cases . . . that involve grand jury inquiries." *Id.* This bafflement over *Branzburg* has been noted time and again. *See, e.g.*, *New York Times Co. v. Gonzales*, No. 04-7677, 2005 WL 427911, at *31 (S.D.N.Y. Mar. 2, 2005) ("the proper interpretation of *Branzburg* is an issue that has divided those circuits that have had occasion to consider it").

Guidance from this Court is needed to resolve the many circuit splits involving *Branzburg*, and the general confusion in the lower courts concerning the existence and scope of a reporter's privilege under the common law and the First Amendment. Whatever the intended meaning of *Branzburg*, the lower courts have been interpreting the decision, and Justice Powell's concurrence, in radically, intolerably different ways, resulting in a patchwork of inconsistent and conflicting legal standards that—as the panel below recognized—only this Court can resolve. *See* Pet. App. 27a & n.3 (Sentelle, J., concurring) ("I think [the common law privilege] argument should appropriately be made to the Supreme Court" as "it is only the High Court and not this one that may act upon that argument."); *id.* at 49a (Tatel, J., concurring) ("if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court"). These issues have now reached the boiling point and warrant resolution by this Court.

A. This Court Should Resolve The Conflicts And Recognize A Common Law Privilege.

Since *Branzburg* was decided in 1972, the law in this area has changed dramatically. Congress enacted Federal Rule of Evidence 501; this Court decided *Jaffee* and established a framework for recognizing new common law privileges under Rule 501; and there has developed an overwhelming consensus among the States to enshrine the reporter's privilege in statutes or through judicial decision.

Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8

(1996). As this Court has explained, "'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.'" *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). Congress, in promulgating Rule 501, "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel*, 445 U.S. at 47). Courts have followed this congressional mandate and recognized many privileges under Rule 501, including the psychotherapist privilege, the spousal privilege, the settlement privilege, the cleric-communicant privilege, the military secrets privilege, and many others.

1. The Circuits Have Adopted Inconsistent And Conflicting Approaches To A Common Law Reporter's Privilege.

In the decision below, each panel member reached a different conclusion on the common law privilege question. Relying largely on *Branzburg*, Judge Sentelle concluded that no privilege existed and suggested that this Court's guidance may be needed; Judge Tatel would have recognized a qualified privilege; and Judge Henderson, while disagreeing with Judge Sentelle that *Branzburg* foreclosed recognition of a common law privilege, declined to resolve the question. Pet. App. 16a ("the Court is not of one mind on the existence of a common law privilege"). The differing conclusions of the three panel members reflect the confusion in the lower courts, which are divided over the existence and scope of a common law reporter's privilege.

The Third Circuit, for example, has recognized the privilege in civil cases, *see Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) ("journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources"), as well as in criminal trials. *See United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) ("journalists have a federal common-law qualified privilege arising under Fed. R.

Evid. 501 to refuse to divulge their confidential sources"). Courts within the Third Circuit have also recognized the privilege in the grand jury context. *See In re Grand Jury Subpoena to Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991) (finding a "qualified news gatherer's privilege against compelled disclosure of his or her news sources in a Grand Jury proceeding"), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc).

The Ninth Circuit, on the other hand, has held that there is no reporter's privilege in cases involving grand jury subpoenas. In *In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993), a graduate student refused to testify before a grand jury, asserting a "scholar's privilege" that the court described as "akin to that of a reporter." The court rejected the privilege, explaining that "*Branzburg* cast doubt on [its] ability to recognize a news gathering privilege in the grand jury context as a matter of common law." *Id.* at 402-03.

The Second Circuit has "long recognized the existence of a qualified privilege for journalistic information" in civil cases, although its decisions "have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law." *Gonzales v. National Broad. Co.*, 194 F.3d 29, 36 & n.6 (2d Cir. 1999). District courts within the circuit have applied the privilege in cases involving grand jury subpoenas. In *New York Times v. Gonzales*, 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005), the court expressly recognized a common law reporter's privilege in the grand jury context—notably, in another case involving Mr. Fitzgerald's attempted use of subpoenas to force Judith Miller to disclose confidential sources. The court held that *Branzburg* "do[es] not preclude this Court from finding a federal common law privilege to have developed in the decades since *Branzburg* was issued" and that "[t]o conclude otherwise would be contrary to the mandate of Rule 501 and the congressional intent underlying that Rule." *Id.* at *43.

For its part, the Fourth Circuit appears to recognize a qualified reporter's privilege in civil cases. *See United States*

v. Steelhammer, 539 F.2d 373, 376-77 & n.* (4th Cir. 1976) (Winter, J., dissenting) (applying balancing test based on Justice Powell's *Branzburg* concurrence and stating that "[u]nder Federal Rule of Evidence 501, [reporters] should be afforded a common law privilege not to testify in civil litigation between private parties"), *rev'd*, 561 F.2d 539 (4th Cir. 1977) (en banc order adopting position of Judge Winter).

Finally, the First Circuit has taken inconsistent and confusing positions. *Compare Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (quoting with approval the Third Circuit's holding in *Riley* that "'journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources'" and that "the flexibility of Rule 501 left ample room for the development of a finely honed, 'ad hoc' approach") *with United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988) (rejecting argument that "a federal common law privilege [exists] wholly apart from the First Amendment").

These conflicts cannot be avoided by trying to distinguish this case because it arises in the grand jury context. There is no privilege known to law that varies depending on the nature of the legal proceeding in which it is asserted, and, in fact, Federal Rule of Evidence 1101(c) expressly provides that "[t]he rule with respect to privileges applies *at all stages* of *all actions*, cases, and proceedings" (emphases added). *See also* FED. R. EVID. 1101(d)(2) (providing that Federal Rules of Evidence do not apply to grand jury proceedings "other than with respect to privileges"); *United States v. Calandra*, 414 U.S. 338, 346 (1974) ("[A grand jury] may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.") (citing *Branzburg*).

2. *Jaffee* And Rule 501 Support The Recognition Of A Common Law Privilege.

This Court's analysis in *Jaffee* strongly supports recognition of a common law reporter's privilege under Rule 501. In *Jaffee*, the Court recognized a psychotherapist-patient privi-

lege, applicable to social workers, by reference to three factors: (1) whether such a privilege is widely recognized by the States; (2) whether the proposed privilege serves significant public and private interests; and (3) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege.

Each *Jaffee* factor supports recognition of a reporter's privilege. *First*, the reporter's privilege is overwhelmingly recognized by the States. Whereas the *Branzburg* Court noted that the majority of the States had not recognized the privilege as of 1972, forty-nine States, as well as the District of Columbia, have now recognized a reporter's privilege. Pet. App. 59a (Tatel, J., concurring) (emphasizing "the shift in favor of the privilege" since *Branzburg*). Thirty-one of these States and the District of Columbia have done so by enacting statutes, commonly referred to as "shield laws." *See, e.g.*, D.C. Code Ann. §§ 16-4701 *et seq*. The remainder have done so by judicial decision. To be sure, the precise scope of the privilege differs from State to State, but the *Jaffee* Court recognized that such limited "variations in the scope of the protection" cannot "undermine the force" of the States' judgment that some form of privilege is warranted. 518 U.S. at 14 n.13.

Jaffee further recognized that because "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court," the "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." 518 U.S. at 13 (footnote omitted). So too here: any State's promise of confidentiality has little value if the source and reporter cannot rely with a high degree of certainty on the fact that the privilege will also be honored in federal court. But right now, federal law is highly uncertain and unpredictable, effectively nullifying state-law protections.

Second, freedom of the press furthers important public and private interests and was established "not for the benefit

of the press so much as for the benefit of all of us." *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967). As this Court has recognized, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). The First Amendment freedoms at stake—and the undeniable importance of a free press to an informed citizenry—are at least as important as the mental health interests at issue in *Jaffee*.

In performing this public function, journalists often must rely on promises of confidentiality to their sources. In many cases this is the only way they can obtain and report information of great public interest. Throughout the nation's history, confidential communications to reporters have resulted in news stories of the greatest public importance, with Watergate perhaps the most famous example. If prosecutors can invoke the power of the courts to compel reporters to reveal their confidential sources, such forced disclosure "would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source." A. Bickel, *The Morality of Consent*, at 84 (1975). *See also Branzburg*, 408 U.S. at 693 ("The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational."); *Cuthbertson*, 630 F.2d at 147 ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes."); Affidavits of Matthew Cooper, Judith Miller, Scott Armstrong and Jack Nelson (Pet. App. 123a, 130a; A287, A433 and A445). Reason and experience thus demonstrate that a reporter's privilege serves powerful public and private interests. Pet. App. 51a (Tatel, J., concurring).

Third, these important interests outweigh any likely evidentiary benefits that would result from denial of the privilege. As this Court explained in *Jaffee*:

> If the [psychotherapist's] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

518 U.S. at 11-12. *See also Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) ("the loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place").

The same is true regarding the reporter's privilege. "Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). In short, given the amount of "evidence" that is "unlikely to come into being" absent a reporter's privilege, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Jaffee*, 518 U.S. at 11, 24. The majority of jurisdictions have been applying a form of reporter's privilege since *Branzburg*, with no discernible effect on law enforcement.

The court below erred, and misapplied *Jaffee*, in declining to recognize a common law privilege. Judge Sentelle concluded that *Branzburg* "rejected a common law privilege" and stated that "[i]n my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*." Pet. App. 26a. But *Branzburg* dealt only with the First Amendment issue, *see* Pet. App. 69a (Tatel, J., concurring), and the view that the common law is frozen *circa* 1972 cannot be reconciled with Rule 501, *Jaffee* and *Trammel*, all of which emphasize that Congress intended the common law to be evolutionary and that new privileges can and should be recognized over time. In fact, Judge Hender-

son specifically rejected Judge Sentelle's conclusion, explaining that "we are not bound by *Branzburg*'s commentary on the state of the common law in 1972." Pet. App. 38a.

3. This Court Should Grant Review To Resolve The Tension Between *Branzburg* And *Jaffee*.

To the extent it can be interpreted to analyze the common law issue, the Court's analysis in *Branzburg* contradicts its analysis twenty-four years later in *Jaffee*. In *Branzburg*, the Court concluded that newsgathering was of constitutional importance and deserved protection, but found it "uncertain" whether there truly would be any consequent "burden on news gathering" if it declined to establish a clear and specifically delineated constitutional privilege. 408 U.S. at 690-91. The Court effectively demanded empirical proof that the lack of such a privilege would deter confidential communications. *Id.* at 690-91, 693. The four *Branzburg* dissenters believed the Court was demanding far too much in the way of proof. *Id.* at 733, 735-36 (Stewart, J., dissenting).

In *Jaffee*, however, the Court made clear that the burden is far less demanding under Rule 501. The Court was content to rest on the prospect that "the *mere possibility* of disclosure may impede development of the confidential relationship" between a psychotherapist and her patient. *Jaffee*, 518 U.S. at 10 (emphasis added); *cf. id.* at 24 (Scalia, J., dissenting) (criticizing majority for not requiring enough evidence that potential disclosure would chill communications). As noted above, many courts in the years since *Branzburg* have concluded that compelling journalists to disclose information obtained from confidential sources *does* harm the flow of information from sources to journalists and, through journalists, to the public, and the record on these points stands clear and unrebutted in this case, making it an ideal vehicle for resolving these issues. *See* Reporters' Affidavits at Pet. App. 123a, 130a; A287, A433 and A445).

In short, while courts are citing *Branzburg* as authority to reject a common law privilege, *Branzburg*'s analysis has

been superseded by *Jaffee*'s approach. The Court should grant review to reconcile these decisions.

B. This Court Should Resolve The Conflicts And Clarify *Branzburg* By Recognizing That The First Amendment Provides Protection For Confidential News Sources.

The same conflicting morass engulfing a common law privilege exists regarding a First Amendment privilege. Although the courts below held that *Branzburg* resolved this question, many courts disagree and have recognized a First Amendment protection against the compelled disclosure of confidential sources. Moreover, this Court's more recent First Amendment decisions undermine *Branzburg* and strongly support recognition of First Amendment protection, as well as a common law privilege, in these circumstances.

1. Courts Have Divided Over The Meaning Of *Branzburg* And The Scope Of A First Amendment Privilege.

The overwhelming majority of courts have interpreted *Branzburg* as recognizing some form of reporter's privilege under the First Amendment. The panel in this case, however, was unanimous in rejecting a First Amendment privilege—a result it believed was compelled by *Branzburg* and one that could only be changed by this Court. Pet. App. 7a-16a. This holding directly conflicts with *Williams*, as well as with Judge Sweet's recent ruling in *New York Times v. Gonzales*, both of which construed *Branzburg* differently and recognized a First Amendment privilege in the context of a grand jury proceeding. It also conflicts with decisions from federal courts recognizing a privilege in criminal trials and state courts of last resort that have specifically recognized a First Amendment reporter's privilege in grand jury proceedings. *See, e.g.*, *In re Letellier*, 578 A.2d 722, 726 (Me. 1990) ("The First Amendment thus requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of informa-

tion against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct.").[6]

This Court's review is needed to resolve the deep divisions among the federal and state courts regarding the meaning of *Branzburg* and whether a First Amendment reporter's privilege exists in criminal cases, including grand jury matters, as well as civil cases.

The Third and Eleventh Circuits hold, in conflict with the panel's decision here, that reporters have a First Amendment privilege in both civil *and* criminal cases. *See Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

In contrast, at least three circuits—the Fourth, Fifth, and Ninth—hold that a First Amendment privilege exists in civil cases, but not in criminal cases. *See LaRouche v. National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) and *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) and *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); *Schoen v. Schoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) and *In re Grand Jury Proceedings*, 5 F.3d 397, 401-02 (9th Cir. 1993).

Two circuits—the Eighth and Tenth—have recognized a First Amendment privilege in civil cases, but have not directly addressed it in the criminal context. *See Cervantes v. Time Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972); *Silkwood v.*

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[6] *See also New Hampshire v. Siel*, 444 A.2d 499, 502 (N.H. 1982) ("Our review of *Branzburg* . . . convinces us that a majority of the justices on the United States Supreme Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources."); *In re Pennington*, 581 P.2d 812, 815 (Kan. 1978) ("Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality.").

Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977). The Second Circuit recognizes a privilege, but has not specified whether it is rooted in the common law or the First Amendment (or both). *See Gonzales v. National Broad. Co.*, 194 F.3d 29, 36 & n.6 (2d Cir. 1999).

The Sixth and Seventh Circuits have taken an entirely different position, and hold that there is no First Amendment privilege in either civil *or* criminal cases. *See In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

The need for this Court's review is demonstrated by the fact that many courts recognize a First Amendment-based reporter's privilege in one context but not in others. For example, the D.C. Circuit, while rejecting a First Amendment privilege in the grand jury context, nonetheless recognizes it in civil cases. *See Zerilli*, 656 F.2d at 711. As discussed above, federal law does not alter privileges based on the nature of the proceeding and specifically contemplates application of privileges in the grand jury context. *See* FED. R. EVID. 1101(c), (d)(2).

Thus, while the nature of the proceeding may have relevance to whether the privilege can be *defeated*, it has no relevance to whether the privilege *exists*. *See, e.g.*, *Gonzales*, 194 F.3d at 34 n.3 (there is "no legally-principled reason" for recognizing the privilege in one context but not another, but noting that the threshold to overcome the privilege may be "lower" in criminal cases). The public interest "in protecting confidential sources . . . does not change because a case is civil or criminal." *Cuthbertson*, 630 F.2d at 147.

2. This Court's Recent First Amendment Decisions Call *Branzburg* Into Question And Support Recognition Of A Privilege.

In rejecting a First Amendment privilege, the D.C. Circuit misread *Branzburg* and discounted the significance of Justice Powell's concurrence, which "narrow[s] what the majority opinion holds, by explaining the more limited interpre-

tation adopted by a necessary member of that majority." *McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting). Justice Powell's opinion makes clear that *Branzburg* did *not* preclude the assertion of a "claim to privilege" based on a reporter's "constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709-10 (Powell, J., concurring). *See* 1 John W. Strong, *McCormick on Evidence* § 76.2, at 288 (5th ed. 1999) (in *Branzburg*, the rejection of the First Amendment privilege "did not command an absolute majority of the Court").

But even if the D.C. Circuit's reading of *Branzburg* is correct, this Court has since rendered a series of First Amendment decisions that demonstrate that the law has developed in a way that strongly supports recognition of some form of privilege today. In cases where generally-applicable laws are applied to intrude on legitimate First Amendment interests, this Court has applied a heightened level of scrutiny and struck down government action that unjustifiably encroaches on those interests. *See, e.g.*, *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994) (reviewing cable television must-carry law); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (reviewing a radio station's distribution of information obtained from third parties who had unlawfully recorded cell phone calls). The rigorous level of scrutiny applied in these more recent cases stands in stark contrast to what the D.C. Circuit believed was *Branzburg*'s rejection of any First Amendment protection for confidential sources, with the result that the needs of law enforcement *always* trump the First Amendment interests at stake.

This Court has emphasized that where, as here, jurisprudential foundations have shifted, the power to bring the Court's earlier precedent in line with new authorities is reserved to this Court alone. Thus, even if the D.C. Circuit's reading of *Branzburg* were correct, the change in First Amendment law since that time makes this case uniquely appropriate for this Court's review. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (overruling case that rested on "in-

creasingly wobbly, moth-eaten foundations") (quotation omitted); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (overruling precedent that had "fallen far out of step" with recent decisions).

C. The Existence Of A Reporter's Privilege Is A Recurring Issue Of Substantial Public Importance.

The questions presented by this petition are substantial and important. This Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public in light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The press, acting on behalf of the public, "serves and was designed to serve as a powerful antidote to any abuses of power by government officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

As shown above, *supra* p.18, the compelled disclosure of reporters' confidential sources endangers their ability to perform their constitutionally-recognized duties, and would stem the flow of information on public events that is vital to an informed citizenry and a healthy democracy. In this case, Cooper's story *A War on Wilson?* focused on the question whether government officials improperly retaliated against a critic of the Administration's decision to go to war. Yet Cooper now faces prison because the court of appeals concluded that a privilege it refused to define was overcome by evidence it refused to let him see.[7]

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[7] The panel's conclusion that any privilege would have been "overcome" by the Special Counsel's secret evidence, Pet. App. 16a, is deeply flawed. First, it makes no sense to deem the privilege "overcome" without having *defined* the privilege. Second, as discussed in Part II *infra*, it violates due process to deem the privilege "overcome" based on secret, *ex*

These issues are recurring with increased frequency. In the last two years, dozens of reporters have been subpoenaed to reveal their confidential sources, many of whom face the prospect of imminent imprisonment. *See* R. Smolkin, *Under Fire*, 27 Am. Journalism Review 18 (2005).

Given the unsettled state of the law in this area, reporters and their sources are subject to a patchwork of differing privilege rules depending on the jurisdiction in which they are subpoenaed. These differing rules can lead to arbitrary and conflicting outcomes, as illustrated by the experience of Judith Miller in the District of Columbia, where she was held in contempt for refusing to divulge her sources in this case, and in New York, where the district court held that the First Amendment and common law protected her from such compelled disclosure in another grand jury investigation being conducted by Mr. Fitzgerald. *See Gonzales*, 2005 WL 427911.[8] This uncertainty also has a chilling effect on speech, and ultimately results in less information reaching the public, as many individuals will hesitate in communicating with a reporter if a promise of confidentiality is respected in some jurisdictions but not others. In the end, differing standards defeat the very purpose of the privilege, as a state-law privilege is of little value if it offers no reliable protection from forced disclosure in federal court.

[Footnote continued from previous page]

parte evidence that neither petitioners nor their counsel were permitted to review.

[8] The identity of a source in the District of Columbia, for example, would be protected by the District's shield law in cases brought in the District of Columbia's courts, but not in federal courts. The shield law, D.C. Code § 16-4703(b), provides that "[a] court may not compel disclosure" of a reporter's sources. Notably, Congress could have "vetoed" the shield law via joint resolution, *see* D.C. Code Ann. § 1-233, but did not exercise its prerogative to do so.

II. REVIEW IS WARRANTED TO RESOLVE WHETHER DUE PROCESS PROHIBITS IMPRISONING OR FINING WITNESSES BASED ON SECRET EVIDENCE.

This Court should also grant review to determine whether the Due Process Clause forbids a court from imprisoning or fining witnesses for contempt based on secret *ex parte* evidence. The court of appeals' decision is incorrect and inconsistent with decisions of this and other courts.

The decision below conflicts with decisions of this Court holding that defendants must be given the opportunity to review and challenge the government's evidence against them before they may be imprisoned. In *In re Oliver*, 333 U.S. 257, 273-75 (1948), this Court reversed a contempt conviction where the district court had denied the defendant the "right to examine the witnesses against him," on the theory that the interest in maintaining grand jury secrecy justified the truncation of the alleged contemnor's right to present a defense. Although "[m]any reasons have been advanced to support grand jury secrecy . . . those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail." *Id.* at 264. *See also Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").

This Court again recognized the primacy of due process in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), in which it evaluated the procedural rights of an alleged enemy combatant in a case where substantial national security interests were at issue. The plurality held that the individual was entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and emphasized that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct

without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id.* at 2648, 2651. *Hamdi* makes clear that when freedom is at stake, due process is not satisfied simply by compelling the government to meet a burden of production—indeed, this Court specifically rejected the government's proffered "some evidence" standard—but rather requires that an accused have the opportunity to challenge and rebut the government's evidence. Cooper and Time enjoyed no such opportunity here.

The D.C. Circuit's decision also conflicts with the Second Circuit's decision in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) and the Ninth Circuit's decision in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973).

In *Kitchen*, the Second Circuit reversed a contempt order that was based on evidence the contemnor was not shown, just as in this case. *Kitchen* involved a grand jury witness who claimed he could not remember key events, and the government—believing his testimony was false and evasive—sought to hold him in contempt. The district court issued a contempt order, relying in part on transcripts from another witness's grand jury testimony—even though the government had disclosed only portions of that transcript to the alleged contemnor. The Second Circuit held that this use of secret evidence denied the witness his "basic right to a fair hearing before he is imprisoned." 706 F.2d at 1272. The court explained that due process includes "the right to confront the government's evidence," a right which "ordinarily includes the right to examine all documents considered by the court in reaching a decision." *Id.* at 1272-73.

In *Alter*, the Ninth Circuit reversed a contempt order involving a witness who refused to answer questions before a grand jury. The witness claimed that the questions were based on the government's illegal surveillance of him and his attorney. The government denied the charge, and the district court held the witness in contempt without convening an evidentiary hearing. The Ninth Circuit held that the contemnor's due process rights were violated because he was denied

the opportunity to demonstrate just cause for his refusal to testify and thereby "deprived of a meaningful opportunity to present his defense." 482 F.2d at 1024.[9]

Nor does grand jury secrecy justify a departure from these basic due process principles, especially since such secrecy is far from absolute. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 498 (D.C. Cir. 1998) (grand jury witnesses may disclose the fact and substance of their testimony). In fact, this Court has "recognized that the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Butterworth v. Smith*, 494 U.S. 624, 630 (1990). Even in cases involving classified information that directly implicates national security—such as enemy combatant cases—the government has made this information available to defendants or their security-cleared counsel. *See United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004) (defendant has due process right to review all evidence in government's possession that is material to his defense); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005) (military tribunals violated due process because "[n]o detainee . . . was ever permitted access to any classified information").

In this case, any government interest in secrecy arising from the nature of grand jury proceedings or the use of classified information could have been vindicated through protective orders limiting review to petitioners or their counsel. Such protective orders are routinely issued under the Classified Information Procedures Act, 18 U.S.C. App. III § 3, and could easily be employed in this case to protect petitioners' due process rights.

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[9] Judge Tatel, in his statement concurring in the denial of rehearing en banc, noted that *Kitchen* and *Alter* did not "involve compulsion of testimony due to failure of an asserted privilege." Pet. App. 120a-121a. This factual distinction makes no constitutional difference. The relevant question is whether alleged contemnors may review and challenge the evidence used against them, and in that regard the D.C. Circuit's decision is inconsistent with decisions from this and other courts.

CONCLUSION

The time has come for this Court to dispel the conflict and confusion that have plagued the lower courts for more than thirty years. This case squarely presents important questions of law that have divided the circuits and left reporters and their sources in a state of uncertainty, jeopardizing the free flow of information to the public. This Court should grant review and recognize a federal reporter's privilege.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 10, 2005

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 8, 2004 Decided February 15, 2005
Reissued April 4, 2005

No. 04-3138

IN RE: GRAND JURY SUBPOENA, JUDITH MILLER

Consolidated with
04-3139, 04-3140

Appeals from the United States District Court
for the District of Columbia
(No. 04mc00407)
(No. 04mc00460)
(No. 04mc00461)

Floyd Abrams argued the cause for appellants. With him on the briefs was *Joel Kurtzberg*. *Donald J. Mulvihill* entered an appearance.

Reid Alan Cox was on the brief for *amicus curiae* Center for Individual Freedom in support of appellants.

Theodore J. Boutrous, Jr. and *Thomas H. Dupree, Jr.* were on the brief for *amici curiae* Magazine Publishers of America, Inc., et al. in support of appellants.

James P. Fleissner, Assistant U.S. Attorney, argued the cause and filed the brief for appellee.

Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Opinion concurring in the judgment filed by *Circuit Judge* TATEL.

SENTELLE, *Circuit Judge*: An investigative reporter for the New York Times; the White House correspondent for the weekly news magazine Time; and Time, Inc., the publisher of Time, appeal from orders of the District Court for the District of Columbia finding all three appellants in civil contempt for refusing to give evidence in response to grand jury subpoenas served by Special Counsel Patrick J. Fitzgerald. Appellants assert that the information concealed by them, specifically the identity of confidential sources, is protected by a reporter's privilege arising from the First Amendment, or failing that, by federal common law privilege. The District Court held that neither the First Amendment nor the federal common law provides protection for journalists' confidential sources in the context of a grand jury investigation. For the reasons set forth below, we agree with the District Court that there is no First Amendment privilege protecting the evidence sought. We further conclude that if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court. We further conclude that other assignments of error raised by appellants are without merit. We therefore affirm the decision of the District Court.

I. Background

According to the briefs and record before us, the controversy giving rise to this litigation began with a political and news media controversy over a sixteen-word sentence in the State of the Union Address of President George W. Bush on January 28, 2003. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." The ensuing public controversy focused not on the British source of the alleged information, but rather on the accuracy of the proposition that Saddam Hussein had sought uranium, a key ingredient in the development of nuclear weaponry, from Africa. Many publications on the subject followed. On July 6, 2003, the New York Times published an op-ed piece by former Ambassador Joseph Wilson, in which he claimed to have been sent to Niger in 2002 by the Central Intelligence Agency ("CIA") in response to inquiries from Vice President Cheney to investigate whether Iraq had been seeking to purchase uranium from Niger. Wilson claimed that he had conducted the requested investigation and reported on his return that there was no credible evidence that any such effort had been made.

On July 14, 2003, columnist Robert Novak published a column in the Chicago Sun-Times in which he asserted that the decision to send Wilson to Niger had been made "routinely without Director George Tenet's knowledge," and, most significant to the present litigation, that "two senior administration officials" told him that Wilson's selection was at the suggestion of Wilson's wife, Valerie Plame, whom Novak described as a CIA "operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, *at* 31. After Novak's column was published, various media accounts reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass

destruction, and that she was involved in her husband's selection for the mission to Niger. One such article, published by Time.com on July 17, 2003, was authored in part by appellant Matthew Cooper. That article stated that:

> Some government officials have noted to Time in interviews . . . that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction . . . [and] have suggested that she was involved in the husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore . . . .

Matthew Cooper et al., *A War on Wilson?*, TIME.COM, *at* http://www.time.com/time/nation/article/0,8599,465270,00.html (Dec. 13, 2004). Other media accounts reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry; CIA Agent's Identity was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A1. The Department of Justice undertook an investigation into whether government employees had violated federal law by the unauthorized disclosure of the identity of a CIA agent. *See, e.g.*, 50 U.S.C. § 421 (criminalizing, *inter alia*, disclosure of the identity of a covert agent by anyone having had authorized access to classified information). As the investigation proceeded, in December of 2003, the Attorney General recused himself from participation and delegated his full authority in the investigation to the Deputy Attorney General as Acting Attorney General. The Deputy, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel and delegated full authority concerning the investigation to him.

As part of the ongoing investigation, a grand jury investigation began in January of 2004.

In cooperation with Special Counsel Fitzgerald, the grand jury conducted an extensive investigation. On May 21, 2004, a grand jury subpoena was issued to appellant Matthew Cooper, seeking testimony and documents related to two specific articles dated July 17, 2003, and July 21, 2003, to which Cooper had contributed. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel. Instead, Cooper moved to quash the subpoena on June 3, 2004. On July 6, 2004, the Chief Judge of the United States District Court for the District of Columbia denied Cooper's motion in open court, and confirmed the denial with reasoning set forth in a written order issued on July 20, 2004.

A further grand jury subpoena was issued to Time, Inc., seeking the same documents requested in the subpoena to Cooper. Time also moved to quash its subpoena. On August 6, 2004, the District Court denied Time's motion. Both Cooper and Time refused to comply with the subpoenas despite the District Court's denial of their motions to quash. The District Court thereafter found that Cooper and Time had refused to comply with the subpoenas without just cause and held them in civil contempt of court. After both Cooper and Time had filed appeals, and further negotiations between Special Counsel and the two had proceeded, Cooper agreed to provide testimony and documents relevant to a specific source who had stated that he had no objection to their release. Cooper and Time fulfilled their obligations under the agreement, the Special Counsel moved to vacate the District Court's contempt order, and the notices of appeal were voluntarily dismissed.

On September 13, 2004, the grand jury issued a further subpoena to Cooper seeking "[a]ny and all documents . . .

[relating to] conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame, a/k/a Valerie Wilson, a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." An August 2, 2004 subpoena to Time requested "[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled 'A War on Wilson?' and the July 21, 2003 Time Magazine article entitled, 'A Question of Trust.'" Cooper and Time again moved to quash the subpoenas, and on October 7, 2004, the District Court denied the motion. The two refused to comply with the subpoenas, and on October 13, 2004, the District Court held that their refusal was without just cause and held both in contempt.

In the meantime, on August 12 and August 14, grand jury subpoenas were issued to Judith Miller, seeking documents and testimony related to conversations between her and a specified government official "occurring from on or about July 6, 2003, to on or about July 13, 2003, . . . concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambassador Wilson) or concerning Iraqi efforts to obtain uranium." Miller refused to comply with the subpoenas and moved to quash them. The District Court denied Miller's motion to quash. Thereafter, the court found that Miller had refused to comply without just cause and held her in civil contempt of court also. She also has appealed.

The appellants have proceeded with common counsel and common briefing in a consolidated proceeding before this court. They assert four theories for reversal. Their first claim is that the First Amendment affords journalists a constitutional right to conceal their confidential sources even against the subpoenas of grand juries. Secondly, they claim

that reporters enjoy an evidentiary privilege under the common law to conceal confidential sources. Adjunct to this claim, while denying that the privilege is less than absolute, they argue that if the privilege is in fact qualified, the United States has not overcome the privilege. Thirdly, appellants argue that their due process rights were violated by the Special Counsel's ex parte and in camera submission of evidence to the court to establish that the United States had overcome any qualified privilege. Finally, they argue that the Special Counsel failed to comply with Department of Justice guidelines for the issuance of subpoenas to journalists, and that the failure to comply is an independent ground for reversal of their contempt conviction. Finding no grounds for relief under the First Amendment, due process clause, or Department of Justice guidelines, and persuaded that any common law privilege that exists would be overcome in this case, we affirm the judgment of the District Court for the reasons set out more fully below.

II. Analysis

A. *The First Amendment Claim*

In his opinion below, the Chief District Judge held that "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection." *In Re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). Appellants argue that "this proposition of law is flatly contrary to the great weight of authority in this and other circuits." Appellants are wrong. The governing authority in this case, as the District Court correctly held, comes not from this or any other circuit, but the Supreme Court of the United States. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar.

Like the present case, *Branzburg* was a consolidated proceeding involving multiple contempt proceedings against

news media defendants. The named petitioner, Branzburg, had been held in contempt in two related proceedings, arising from one extended task of investigative journalism. The first arose from an article published by his employer, a daily newspaper, describing his observation of two Kentucky residents synthesizing hashish from marijuana as part of a profitable illegal drug operation. The article included a photograph "of hands working above a laboratory table on . . . a substance identified . . . as hashish." 408 U.S. at 667. A Kentucky grand jury subpoenaed the journalist who "refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana." *Id.* at 668. Branzburg claimed privilege both under the First Amendment of the United States Constitution and various state statutory and constitutional provisions. He was held in contempt and the proceeding eventually made its way to the Supreme Court.

The second case involving petitioner Branzburg arose out of a later article published by the same newspaper describing the use of drugs in Frankfort, Kentucky. According to the article, this publication was the product of two weeks spent interviewing drug users in the area. The article further reported that its author had seen some of his sources smoking marijuana. The article related numerous conversations with and observations of unnamed drug users. Branzburg was again subpoenaed to appear before a Kentucky grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," *id.* at 669 (internal quotation marks omitted). Branzburg moved to quash the subpoena. The motion was denied. The journalist sought the protection of the Kentucky Court of Appeals by way of mandamus and prohibition, claiming "that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given him in confidence, his effectiveness as a reporter would be greatly damaged." *Id.* at 670. The Kentucky courts rejected

Branzburg's claim of a First Amendment privilege. Again, he petitioned for certiorari in the Supreme Court.

The consolidated petitions in *Branzburg* also included *In re Pappas*. Petitioner Pappas was a television newsman-photographer for a Massachusetts television station. On July 30, 1970, during a time of civil unrest in New Bedford, Massachusetts, he gained entrance to the headquarters of the Black Panther Party, upon his agreement not to disclose anything he saw or heard inside the headquarters. Subsequently, he was subpoenaed to appear before a Massachusetts grand jury. Although he appeared and answered other questions, he refused to answer any questions about what had taken place inside the Black Panther headquarters, "claiming that the First Amendment afforded him a privilege to protect confidential informants and their information." *Id.* at 673. The Massachusetts trial court denied his motion to quash made on First Amendment and other grounds and ruled that the journalist "had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed." *Id.* Like Branzburg, Pappas petitioned for certiorari to the United States Supreme Court.

In the final petition consolidated in the *Branzburg* proceedings, the Court considered the petition for certiorari of the United States from a decision of the Ninth Circuit Court of Appeals, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), in which the circuit had recognized a qualified testimonial privilege for newsmen arising from the First Amendment and allowing a reporter claiming protection under the privilege to refuse to testify before a grand jury investigating allegations of violations of numerous criminal statutes by the Black Panther Party in California. The reporter in *Caldwell* had engaged in investigative journalism directed toward the Black Panthers at a time when they were suspected of such crimes as making threats against the

President of the United States and a possible conspiracy to assassinate the President, as well as interstate travel to incite rioting and the commission of mail frauds and swindles. He claimed to have obtained information from confidential informants.

As can be seen from the account of the underlying facts in *Branzburg*, there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today. Each of the reporters in *Branzburg* claimed to have received communications from sources in confidence, just as the journalists before us claimed to have done. At least one of the petitioners in *Branzburg* had witnessed the commission of crimes. On the record before us, there is at least sufficient allegation to warrant grand jury inquiry that one or both journalists received information concerning the identity of a covert operative of the United States from government employees acting in violation of the law by making the disclosure. Each petitioner in *Branzburg* and each journalist before us claimed or claims the protection of a First Amendment reporter's privilege. The Supreme Court in no uncertain terms rejected the existence of such a privilege. As we said at the outset of this discussion, the Supreme Court has already decided the First Amendment issue before us today.

In rejecting the claim of privilege, the Supreme Court made its reasoning transparent and forceful. The High Court recognized that "the grand jury's authority to subpoena witnesses is not only historic . . . but essential to its task." 408 U.S. at 688 (citation omitted). The grand juries and the courts operate under the "longstanding principle that 'the public has a right to every man's evidence,' except for those persons protected by constitutional, common law, or statutory privilege." *Id.* (citations and internal punctuation omitted). The Court then noted that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal

Constitution is the Fifth Amendment privilege against compelled self-incrimination." *Id.* at 689-90. The Court then expressly declined "to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. In language as relevant to the alleged illegal disclosure of the identity of covert agents as it was to the alleged illegal processing of hashish, the Court stated that it could not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about a crime than to do something about it." *Id.* at 692.

Lest there be any mistake as to the breadth of the rejection of the claimed First Amendment privilege, the High Court went on to recognize that "there remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others." *Id.* at 693. As to this category of informants, the Court was equally adamant in rejecting the claim of First Amendment privilege:

> [W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

The *Branzburg* Court further supported the rejection of this claimed privilege by the commonsense observation that "it is obvious that agreements to conceal information relevant to the commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696. While the Court recognized the right of the press to abide by

its agreements not to publish information that it has, the Court stated unequivocally that "the right to withhold news is not equivalent to a First Amendment exemption from an ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function." *Id.* at 697.

We have pressed appellants for some distinction between the facts before the Supreme Court in *Branzburg* and those before us today. They have offered none, nor have we independently found any. Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.

Despite the absolute and unreversed answer to the question of constitutional privilege by the Supreme Court in *Branzburg*, appellants nonetheless persist in arguing that the District Court erred in concluding that journalists subpoenaed to reveal their confidential sources before federal grand juries enjoy no First Amendment protection. They base this argument on the concurring opinion of Justice Powell in *Branzburg* and a case from this circuit, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). These authorities, either separately or together, provide no support for the existence of such a privilege protecting reporters subpoenaed to a grand jury. Appellants' argument concerning Justice Powell's concurrence begins with the fact that the decision of the Supreme Court was reached by a 5-4 divided Court. Thus, each of the justices joining in the result was essential to the result. Therefore, appellants argue, it is the opinion of the least encompassing justice which determines the precedent set by the decision rather than the decision which appellants

style a "plurality" opinion authored by Justice White. In support of this proposition, they advance an argument that first admits that when the opinion of an individual justice is not needed for a majority his separate opinion is not a gloss giving authoritative definition to the majority opinion in which he did not join, but rather is no more than his separate thoughts, and "the meaning of a majority opinion is to be found within the opinion itself." *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (Blackmun, J., concurring). But, appellants argue, when the individual justice is needed to constitute the majority, "the opinion is not a majority except to the extent that it agrees with his views. What he writes is not a 'gloss' but the least common denominator." That is to say, the separate opinion "cannot add to what the majority opinion holds, binding the other four justices to say what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority . . . ." *Id.* at 462 n.3 (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

Without attempting to resolve any dispute or difference that may exist between Justice Blackmun and the three dissenting justices in *McKoy*, even if we accept Justice Scalia's analysis at full value, it does not help appellants in this case. Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority. He wrote separately "to emphasize" what seemed to him "to be the limited nature of the Court's holding." 408 U.S. at 709 (Powell, J., concurring). Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants.

Nonetheless, appellants urge that Justice Powell must have been contemplating the creation or recognition of some further sort of First Amendment privilege for reporters asserting confidential sources, else why would he have bothered writing? To that, the United States replies that by its terms Justice Powell's opinion recognizes only that

> if the newsman is called upon to give information bearing only on a remote and tenuous relationship to the subject investigation, of if he has some other reason to believe that his testimony implicates confidential source relationships *without a legitimate need of law enforcement*, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710 (emphasis added).

Therefore, the United States contends, Justice Powell, who expressed no disagreement with the majority about the existence of a constitutional privilege, only emphasized that there would be First Amendment protection in cases of bad faith investigations. Appellants counter that Justice Powell could not have meant what the United States argues, as this would have given reporters no more protection than other citizens. However, they never make it clear why they are convinced that Justice Powell must have intended to give reporters more protection than other citizens. The Constitution protects all citizens, and there is no reason to believe that Justice Powell intended to elevate the journalistic class above the rest. *Cf. Branzburg* at 690 ("the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination.").

In any event, whatever Justice Powell specifically intended, he joined the majority. Not only did he join the

majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely like those in the present case. As we noted above, there is no factual difference between *Branzburg* and the present case. If Justice Powell in any way meant to afford more protection than was afforded by the rest of the majority, that protection cannot possibly extend to appellants as *Branzburg* is directly on point and reached a result in which Justice Powell joined, rejecting the applicability of constitutional privilege.

Zerilli cannot possibly help appellants, although they assert that *Zerilli*, citing Justice Powell's "deciding vote" in *Branzburg*, recognized, at least in dicta, a reporter's privilege in civil cases and held that *Branzburg* was not controlling as to that issue. Indeed, the *Zerilli* Court expressly distinguished its case from *Branzburg*. "Although *Branzburg* may limit the scope of a reporter's First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective law enforcement is absent, that case is not controlling." 656 F.2d at 705. *Zerilli* has no force in the present case. Even if *Zerilli* states the law applicable to civil cases, this is not a civil case. *Zerilli* could not subtract from the Supreme Court's holding in *Branzburg*. *Zerilli*, along with several other lower court decisions cited by appellants, may recognize or at least suggest the possibility of privileges under various circumstances. None of them can change the law applicable to grand juries as set forth in *Branzburg*. As the Supreme Court has told us:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to

> this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989). The Supreme Court has not overruled *Branzburg*.

B. *The Common Law Privilege*

Appellants argue that even if there is no First Amendment privilege protecting their confidential source information, we should recognize a privilege under federal common law, arguing that regardless of whether a federal common law privilege protecting reporters existed in 1972 when *Branzburg* was decided, in the intervening years much has changed. While appellants argue for an absolute privilege under the common law, they wisely recognize the possibility that a court not recognizing such an absolute privilege might nonetheless find a qualified privilege. They therefore also argue that if there is a qualified privilege, then the government has not overcome that qualified privilege. The Court is not of one mind on the existence of a common law privilege. Judge Sentelle would hold that there is no such common law privilege for reasons set forth in a separate opinion. Judge Tatel would hold that there is such a common law privilege. Judge Henderson believes that we need not, and therefore should not, reach that question. However, all believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing. All further believe, for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome. Therefore, the common law privilege, even if one exists, does not warrant reversal.

C. *The Due Process Argument*

While appellants insist that their privilege is absolute, they assert a secondary line of argument that if their privilege is conditional, then their due process rights have been

violated by the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions in support of the enforcement of the subpoenas. This argument is without merit. As appellants themselves admit in their brief, this circuit has recognized that "a district court can ensure that [grand jury] secrecy is protected by provisions for sealed, or when necessary *ex parte*, filings." *In re Grand Jury*, 121 F.3d 729, 757 (D.C. Cir. 1997). Indeed, the rule of grand jury secrecy is so well established that we have noted that "[t]here is a plethora of authority recognizing that the grand jury context presents an unusual setting where privacy and secrecy are the norm." *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000) (collecting authorities).

As the Supreme Court has reminded us on occasion, "the grand jury is an institution separate from the courts." *United States v. Williams*, 504 U.S. 36, 47 (1992). The function of that separate institution is to "serv[e] as a kind of buffer or referee between the government and the people." *Id.* The function of the grand jury "depends on 'maintaining the secrecy of the grand jury proceedings in the federal courts.'" *In re Sealed Case*, 199 F.3d at 526 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)). The authorities collected in *In re Sealed Case* recite the broad variety of circumstances in which the courts have upheld this grand jury secrecy, a secrecy that has been the persistent rule for grand jury proceedings for at least four hundred years. *See Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye.").

In the *Douglas Oil* decision, the Supreme Court catalogs multiple reasons for preserving the ancient secrecy of the grand jury:

> (1) disclosure of pre-indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."

In re North (Omnibus Order), 16 F.3d 1234, 1242 (D.C. Cir., Spec. Div., 1994) (quoting *Douglas Oil Co.*, 441 U.S. at 218-19).

Appellants have offered nothing to take the present grand jury investigation outside the general rule, let alone elevate their objections to constitutional due process status. Indeed, appellants' argument is principally built around a case from another circuit never authoritative here, no longer authoritative in the circuit of its origin, and distinguishable on its facts from the beginning. In *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973), the court ruled that a defendant who had been held in contempt for refusing to furnish finger and palm print exemplars to a federal grand jury was deprived of her due process rights when the district court refused to let her inspect an ex parte government affidavit upon which the court had determined that the grand jury's request was reasonable. The Ninth Circuit itself has since declared that "to the extent that our decision in *United States v. Dinsio* . . . may be considered to support the witness in his refusal to cooperate, it has been superseded by *United States v. Mara* [410 U.S. 19 (1973)], and *United States v. Dionisio*, 410 U.S. 1 (1973)." *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975). The Ninth Circuit went on to say

"nothing in the law of this circuit now requires a court to interrupt a grand jury while a recalcitrant witness produces a series of mini trials challenging the reasonableness of the government's efforts to obtain fingerprint, voice, or handwriting exemplars or the relevance of such exemplars to the government's case." *Id.*

Similarly, *Dinsio* was never the law of this circuit, just as it is no longer the law of the Ninth Circuit, and nothing in the law of the District of Columbia Circuit requires or has ever required a district court to interrupt the grand jury while a recalcitrant witness enjoys a series of mini trials over his access to materials cloaked by grand jury secrecy.

Assuming for the sake of this case that the general rule of grand jury secrecy is not sufficient to justify the District Court's use of *in camera* and *ex parte* proceedings, we further note that we have approved the use of such a procedure in other cases raising privilege claims. In *In re Sealed Case No. 98-377*, 151 F.3d 1059 (D.C. Cir. 1998), a case, like this one, involving the use of *in camera* and *ex parte* proceedings in the context of a Rule 6(e) motion by the government, we upheld their use, and in so doing, relied, at least in part, on precedent established in privilege analysis. We observed there that "courts often use *in camera*, *ex parte* proceedings to determine the propriety of a crime fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *Id.* at 1075 (citing *In re Grand Jury*, 103 F.3d 1140, 1145 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253 (1997)). Having previously noted the propriety of the procedures to protect the well-established attorney-client privilege, we are persuaded that a similar protection of grand jury secrecy is appropriate to protect whatever privilege, if any, may exist between a reporter and a confidential source.

We affirm the District Court's ruling on the maintenance of the seal of grand jury secrecy.

D. *Department of Justice Guidelines*

In their final argument for reversal of the District Court's contempt finding, appellants contend that the Special Counsel did not comply with the Department of Justice guidelines for issuing subpoenas to news media and that such failure provides an independent basis for reversal. The District Court expressed its doubt that the DOJ guidelines were enforceable, but found that even if they were, Special Counsel had fully complied with the guidelines. Because we conclude that the guidelines create no enforceable right, we need not reach the question of the Special Counsel's compliance.

The guidelines in question are set forth in 28 C.F.R. § 50.10 and the United States Attorney's Manual, § 9-2.161. Those guidelines provide that subpoenas for testimony by news media must be approved by the Attorney General, a requirement not pertinent in the present case as the Special Counsel had received delegation of all the Attorney General's authority, and should meet the following standards:

(a) "In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information." 28 C.F.R. § 50.10(f)(1).

(b) Before issuing a subpoena to a member of the news media, all reasonable efforts should be made to obtain desired information from alternative sources. *Id.* at §§ 50.10(b), 50.10(f)(3);

(c) Wherever possible, subpoenas should be directed at information regarding a limited subject matter and a reasonably limited period of time. Subpoenas should avoid requiring production of a large volume of unpublished materials and provide reasonable notice of the demand for documents. *Id.* at § 50.10(f)(6);

(d) "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of published information." *Id.* at § 50.10(f)(4); and

(e) When issuance of a subpoena to a member of the media is contemplated, the government shall pursue negotiations with the relevant media organization. The negotiations should seek accommodation of the interests of the grand jury and the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media. *Id.* at § 50.10(c).

However, as the District Court correctly observed, the guidelines expressly state that they do "not create or recognize any legally enforceable right in any person." *Id.* at § 50.10(n). This reservation has been upheld by several federal appellate and district courts. *See In re Special Proceedings*, 373 F.3d 37, 44 n.3 (1st Cir. 2004) (noting that DOJ guidelines state that they do not create legally enforceable rights); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (D. Ark. 1996) (declining to quash subpoena based on failure to comply with DOJ regulations, on ground that regulations, by their own terms, confer no rights on media witnesses). *See also In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994) (holding that special prosecutor's

failure to comply with guidelines regarding issuance of subpoenas to attorney, even if applicable, were not enforceable by witness through motion to quash). The guidelines, not required by any constitutional or statutory provision, *see In re Special Proceedings*, 373 F.3d at 44 n.3, exist to guide the Department's exercise of its discretion in determining whether and when to seek the issuance of subpoenas to reporters, not to confer substantive or procedural benefits upon individual media personnel. *See In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (holding reporters have no right to seek enforcement of DOJ guidelines before being compelled to testify) (citing *United States v. Caceres*, 440 U.S. 741 (1979) (exclusionary rule not applicable to evidence obtained in violation of internal IRS regulations governing electronic surveillance)); *In re Grand Jury Proceedings No. 92-4*, 42 F.3d at 880 (following *In re Shain*, 978 F.2d at 854).

Appellants rely on *Morton v. Ruiz*, 415 U.S. 199 (1974). In that case, the Supreme Court stated that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* at 235.

Ruiz, however, is distinguishable. Regulations considered by the Court in that case required the publication of directives that "inform the public of privileges and benefits available and of eligibility requirements." *Id.* (quotation marks omitted). The Supreme Court found that the publication requirement was intended to benefit potential beneficiaries and therefore invalidated a Bureau of Indian Affairs attempt to limit general assistance benefits to otherwise eligible beneficiaries based on an unpublished eligibility requirement. This reasoning has no applicability to the guidelines before us.

It is well established that the exercise of prosecutorial discretion is at the very core of the executive function. Courts consistently hesitate to attempt a review of the executive's exercise of that function. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). Federal prosecutors have "broad discretion to enforce the Nation's criminal laws." *Id.* at 464 (internal punctuation and citations omitted). The prosecutor's discretion arises from their designation "as the President's delegates to help him discharge his constitutional responsibility to 'take care that the laws be faithfully executed.'" *Id.* (quoting U.S. CONST. art. II, § 3). Given the nature of the guidelines themselves, and the function they govern, we conclude that the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors. We therefore need not reach the question of the Special Counsel's compliance with the guidelines, and again we affirm the decision of the District Court.

III. Conclusion

For the reasons set forth above, the judgment of the District Court is affirmed.

SENTELLE, *Circuit Judge, concurring*: As noted in the opinion of the court, I write separately to express my differing basis for affirming the District Court on the common law privilege issue. I would hold that reporters refusing to testify before grand juries as to their "confidential sources" enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens. While I understand, and do not actually disagree with, the conclusion of my colleagues that any such privilege enjoyed by the reporters has been overcome by showing of the United States, and that we therefore need not determine whether such privilege exists, I find this ordering of issues a bit disturbing. To me, the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it. While I understand Judge Henderson's theory that she cannot support a privilege afforded by the common law which would not be overcome by the quantum of proof offered by the government, I think it more logical to not reach the quantum question in the absence of a determination as to the existence of the privilege than to proceed the other way around.[1] That said, I fully join the conclusion that we should affirm the District Court's decision to hold the appellants in contempt, unswayed by their claim of protection of common law privilege. I write separately only to explain my reasons for rejecting the theory that such a privilege is known to the common law.

I base my rejection of the common law privilege theory on foundations of precedent, policy, and separation of powers. As to precedent, I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), to be as dispositive of the question of

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[1] See Opinion of Judge Tatel at pp. 5-9.

common law privilege as it is of a First Amendment privilege. While *Branzburg* generally is cited for its constitutional implications, the Branzburg Court repeatedly discussed the privilege question in common law terms as well as constitutional. Indeed, the majority opinion by Justice White includes the phrase "common law" no fewer than eight times. More significant than the fact that the Court frequently spoke of the common law is what the Court had to say about it: "at common law, courts consistently refuse to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Id.* at 685 (collecting cases).

At page 688, the Court continued, "although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, *common law*, or statutory privilege . . . is particularly applicable to grand jury proceedings." (emphasis added) (citations omitted). Significantly, the Court made this statement in the course of holding the journalists litigating before it unprotected by privilege against contempt citations. Granted, the Court expressly held that it was not about to create a new "constitutional" privilege. But in the same paragraph with that rejection it expressly discusses the possible protection of common law and in the end reaches a result that leaves the reporters unprotected. I think it therefore indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment. Especially is this so when we consider that it makes little sense to assume that the Court first reached out to take a constitutional question it would not have needed to answer had there been such a common law privilege, and

then proceeded to answer that question in such a fashion as to reach a result upholding contempt citations and reversing vacation of such citations.[2]

Because the Supreme Court rejected the common law privilege, I think it would be at least presumptuous if not overreaching for us to now adopt the privilege. As the opinion of the court notes, "the Supreme Court has told us:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Maj. Op. at 16 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

The Supreme Court has rejected a common law privilege for reporters subpoenaed to give evidence to grand juries. In my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*. Although the appellants argue that other changes in the law since

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[2] By way of comparison, under the constitutional avoidance doctrine, the Supreme Court counsels courts "to adopt constructions of statutes to 'avoid decision of constitutional questions,' not to deliberately create constitutional questions." *See, e.g.*, *McConnell v. Federal Election Commission*, 540 U.S. 93, 180 (2003); *United States v. 37 Photographs*, 402 U.S. 363, 373 (1971), *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 407 (1909); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Branzburg should lead to an opposite result, I think that argument should appropriately be made to the Supreme Court, not the lower courts.[3]

Even if appellants are correct that we would have the power to adopt such a privilege in the face of the *Branzburg* precedent, I nonetheless would not accept that invitation. Appellants' argument for our authority to adopt the new privilege begins with the Federal Rules of Evidence. Rule 501, enacted by Congress in the Federal Rules of Evidence in 1975, three years after *Branzburg*, rejected an enumeration of specific federal privileges and provided that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Although the rules became effective after *Branzburg*, Rule 501 does not effect any change in the authority of federal courts to adopt evidentiary privileges. Before the enactment of the Federal Rules of Evidence, the authority of the federal courts to adopt common law privileges was governed by case law. The relevant case law provided for precisely the same authority as Congress enacted in the rules. Indeed, the language of the rule is drawn directly from case law governing at the time of *Branzburg*. The Supreme Court expressly held in *Wolfle v. United States*, 291 U.S. 7 (1934), that

> the rules governing the competence of witnesses in criminal trials in the federal

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[3] I wish to make it plain that I do not fault the appellants for making the argument, understanding that they must if they wish to preserve it for Supreme Court review. Nonetheless, I think it is only the High Court and not this one that may act upon that argument.

> courts are not necessarily restricted to those local rules enforced at the time of the admission into the union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

291 U.S. 7, 12 (1934) (citing *Funk v. United States*, 290 U.S. 371 (1933)) (emphasis added). Given the venerable origins of the language used in Rule 501, it cannot be said that the courts have more power to adopt privileges today than at the time of *Branzburg*. The power is precisely the same. Thus, the enactment of Rule 501 cannot by itself work any change in the law which should empower us to depart from the Supreme Court's clear precedent in *Branzburg*.

Appellants persist, however, that the state of the common law has changed sufficiently to warrant a new approach. By appellants' count, at the time of the *Branzburg* decision, only seventeen states had enacted what appellants refer to as "shield laws" to protect journalists from forced disclosure of confidential sources or newsgathering materials, while today, thirty-one states (plus the District of Columbia) have such statutes.[4] Nonetheless, I think it

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[4] The fact that the adoption has been by legislation rather than court decision does not deprive the change in law of common law force. As the Supreme Court has noted, "the policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one[,]" and further has told us that "it is of no consequence that recognition of the privilege in the vast majority of the states is the product of legislative action rather than judicial decision." *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).

remains the prerogative of the Supreme Court rather than inferior federal tribunals to determine whether these changes are sufficient to warrant an overruling of the Court's rejection of such a common law privilege in *Branzburg*.

Furthermore, even if we are authorized to make that decision, reasons of policy and separation of powers counsel against our exercising that authority. While I concede that the adoption of the "shield" by legislation rather than judicial fiat does not prevent the change being considered by the courts in assessing the common law, I find the adoption of the privilege by the legislatures of the states instructive as to how the federal government should proceed, if at all, to adopt the privilege. The statutes differ greatly as to the scope of the privilege, and as to the identity of persons entitled to the protection of the privilege. We have alluded in the majority opinion to the differing decisions of courts as to civil, criminal, and grand jury proceedings. There is also a more fundamental policy question involved in the crafting of such a privilege.

The Supreme Court itself in *Branzburg* noted the difficult and vexing nature of this question, observing that applying such privilege would make it

> necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

408 U.S. at 704. The Supreme Court went on to observe that "freedom of the press is a 'fundamental personal right . . . not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets .... The press in its historic connotation comprehends every sort of publication

which affords a vehicle of information and opinion.'" *Id.* (quoting *Lovell v. Griffin*, 304 U.S. 444, 450, 452 (1938)). Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?

The state legislatures have dealt with this vexing question of entitlement to the privilege in a variety of ways. Some are quite restrictive. Alabama limits its protection to "person[s] engaged in, connected with, or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity." ALA. CODE § 12-21-142. Alaska's statutes protect only the "reporter," a category limited to "person[s] regularly engaged in the business of collecting or writing news for publication or presentation to the public, through a news organization." ALASKA STAT. § 09.25.300. The statutory privilege in Arizona protects "a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper or radio or television station . . . ." ARIZ. REV. STAT. § 12-2237. Arkansas's legislature has declared

the privilege applicable to "any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station . . . ." ARK. CODE ANN. § 16-85-510. Delaware is perhaps the most specific, protecting a "reporter," which

> means any journalist, scholar, educator, polemicist, or other individual who either: (a) At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or (b) Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

DEL. CODE ANN. tit. 10 § 4320. Presumably, states such as these would provide the privilege only to the "established" press.

Others are quite inclusive. The Nebraska legislature, for example, has declared:

> (1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere; (2) That such persons shall not be inhibited, directly or

> indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed.

NEB. REV. STAT. § 20-144. To that end, it protects any "medium of communication" which term "shall include, *but not be limited to*, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." *Id.* at § 20-145(2) (emphasis added).

In defining the persons protected by that privilege, Nebraska tells us that "Person shall mean any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country." *Id.* at 20-145(7). Presumably, then, Nebraska, perhaps more in keeping with the spirit of the recent revolutionaries who gave us the First Amendment, protects the pamphleteer at the rented printer, and the blogger at the PC, as well as the giant corporation with its New York publishing house.

The variety of legislative choices among the states only serves to heighten the concern expressed by the majority in *Branzburg*. *See* 408 U.S. at 704. This concern is reinforced by examination of the *Jaffee* decision, upon which appellants rely. In *Jaffee*, the Supreme Court extended a federal privilege "to confidential communications made to licensed social workers in the course of psychotherapy." 518 U.S. at 15. There is little definitional problem with the application of this privilege. The court need only ask: Does this "social worker" have a license? If the answer is "yes," then the privilege applies; if it's "no," the privilege does not. If the

courts extend the privilege only to a defined group of reporters, are we in danger of creating a "licensed" or "established" press? If we do so, have we run afoul of the breadth of the freedom of the press, that "fundamental personal right" for which the Court in *Branzburg* expressed its concern? 408 U.S. at 704. Conversely, if we extend that privilege to the easily created blog, or the ill-defined pamphleteer, have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation?

Nor does the identity of the protected persons constitute the only difficult policy decision. *Branzburg* enumerates several concerns. For example, does "the public interest in possible future news about crime from undisclosed, unverified sources . . . take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future"? *Id.* at 695. Do "agreements to conceal information relevant to the commission of crime avail little to recommend them from the standpoint of public policy"? *Id.* at 696. What are we to do with the historic common law recognition of "a duty to raise the 'hue and cry' and report felonies to the authorities"? *Id.* (*see also* authorities collected in *id.* at 696 n.34). Should we be creating immunity from prosecution for "misprision" of a felony—that is, the concealment of a felony? *Id.* at 696.

Should the privilege be absolute or limited? If limited, how limited? Without attempting to catalog, I note that the state statutes provide a variety of answers to that policy question. Therefore, if such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication? Here, I think the experience of the states is

most instructive. The creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts.

For all the reasons set forth above, I would hold that there is no common law privilege protecting reporters or any other news media personnel, no matter how defined, from the reach of grand jury subpoenas on claim of confidentiality.

HENDERSON, *Circuit Judge*, concurring: I write separately to emphasize that adherence to the principle of judicial restraint—patience in judicial decision-making—would produce a better result in II.B of the majority opinion. Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not, and therefore should not, decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

In our circuit it is a venerable practice, and one frequently observed, to assume *arguendo* the answer to one question—*e.g.*, whether to recognize a federal common-law reporter's privilege—in order to resolve a given case by answering another and equally dispositive one—*e.g.*, whether *any* privilege would protect these reporters.[1] Although both

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[1] *See, e.g., Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) (because appellant failed to show sufficient need for attorney interview notes, court "save[d] for another day" "difficult matters" of determining "degree of selection necessary to transform facts into opinions and the standard of review we should employ of a district court determination" regarding discovery of attorney work product); *Littlewolf v. Lujan*, 877 F.2d 1058, 1065 (D.C. Cir. 1989) ("find[ing] it unnecessary to address the difficult questions raised by appellants regarding the Due Process adequacy of the period provided by the Act" because "[e]ven if we assume arguendo that the six-month limitations period is unreasonably short and that, as a consequence, the Act effectively 'takes' the Band members' property rights, we conclude that the statute provides the Indians with just compensation"); *cf. Michel v. INS*, 206 F.3d 253, 260 n.4

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of my colleagues question the logic of this approach here, it is a mode of decisionmaking they themselves have often used.[2] In this case, however, they employ two divergent

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(2d Cir. 2000) ("Where . . . no harm results from our failing to answer a question, we believe that the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.'" (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in judgment))).

[2] *See, e.g.*, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002) (Sentelle, J.) (assuming union organizer's activity constituted "concerted activity" under 29 U.S.C. § 157 but holding it was not protected under statute); *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (Tatel, J.) ("continu[ing]" assumption that Religious Freedom Restoration Act applies to federal government and holding prisoners failed to exhaust administrative remedies); *Carney v. Am. Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (Tatel, J.) (assuming without deciding retaliation violates 42 U.S.C. § 1981 and remanding claim for trial); *Massachusetts. v. United States Dep't of Transp.*, 93 F.3d 890, 892 (D.C. Cir. 1996) (Sentelle, J.) ("We need not determine whether an agency's interpretation of a statute on the preemption question is subject to *Chevron* analysis in order to decide this case, as the agency's determination here cannot be upheld with or without deference.").

Judge Tatel distinguishes these cases by concluding that their analysis cannot be used to avoid the "dispositive" issue in this case. Tatel Slip Op. at 8. There are, however, only three ways of answering the question whether these reporters' confidential source information is protected by a federal common-law privilege: (1) there is no privilege, (2) there is an absolute privilege

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forms of "wide-angle adjudication." *See* Harry T. Edwards, *The Role of the Judge in Modern Society: Some Reflections on Current Practices in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 414 (1983-84). Judge Sentelle would hold that a reporter enjoys no federal commonlaw privilege to refuse to provide a bona fide grand jury with relevant documents and testimony while Judge Tatel would fix the contours of a qualified reporter's privilege by using a novel multi-factor balancing test only to conclude that it helps these reporters not at all.[3]

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and (3) there is a qualified privilege. None of us, including the reporters in their brief, would choose door number two, see Tatel Slip Op. at 19; Appellants' Br. at 42, and only one of us heads for door number one, see Sentelle Slip Op. at 1. That leaves door number three. But in choosing this route, the critical question is not definitional, as Judge Tatel sees it, see Tatel Slip Op. at 8, but quantitative: Is the Special Counsel's evidentiary proffer *sufficient* to overcome any qualified privilege that may exist? Because we agree that the answer is "yes," there is no need for us to go any further. Granted, the circumstances of the cited cases differ but they use the same analysis. Moreover, its application here is consistent with the tried and true principle that "[w]here . . . no harm results from our failing to answer a question, . . . the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.'" *Michel*, 206 F.3d at 260 n.4 (quoting *Air Courier Conference of Am.*, 498 U.S. at 531 (Stevens, J., concurring in judgment)); *see supra* note 2.

[3] Judge Tatel maintains that "[f]or the sake of reporters and sources," we must establish the contours of a privilege in order to "clarify the rules governing their relationship." Tatel Slip Op. at 9. But the press's collection of information, including from

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While I am convinced that we need not, and therefore should not, go further than to conclude, as did the district court, *see* Appendix 35-36, 275, that the Special Counsel's showing decides the case, I feel compelled to comment briefly on my colleagues' opposing conclusions if only to make clear why I think it unwise to advance either of them. I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question we now avoid. *Branzburg v. Hayes* addressed only "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the *First Amendment*" and "h[e]ld that it does not." 408 U.S. 665, 667 (1972) (emphases added). The boundaries of constitutional law and common law do not necessarily coincide, however, and while we are unquestionably bound by *Branzburg*'s rejection of a reporter's privilege rooted in the First Amendment, we are not bound by *Branzburg*'s commentary on the state of the common law in 1972. Federal Rule of Evidence 501, which came into being nearly three years after *Branzburg*, authorizes federal courts to develop testimonial privileges "in the light of reason and experience," allowing for the often

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confidential sources, seems to me near impervious to regulation: "[E]xperience teaches us more than sufficiently that men have nothing less in their power than their tongue . . . ." BENEDICT DE SPINOZA, ETHICS 168 (G.H.R. Parkinson ed. & trans., Oxford Univ. Press 2000); *cf.* STANLEY WALKER, CITY EDITOR 44 (Johns Hopkins Univ. Press 1999) (1934) ("Women, wampum, and wrongdoing are always news."). As the *Branzburg* Court recognized, "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena." 408 U.S. 665, 694 (1972).

evolving state of the common law. *See* FED. R. EVID. 501; *Trammel v. United States*, 445 U.S. 40, 47 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege."); *id.* ("The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges."). Judge Sentelle's view also discounts the fact that, even as they rejected a reporter's First Amendment right to withhold testimony from a bona fide grand jury, both the *Branzburg* majority opinion as well as Justice Powell's separate concurrence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government.[4]

At the same time, I am far less eager a federal common-law pioneer than Judge Tatel as I find less comfort than he in riding *Jaffee v. Redmond*, 518 U.S. 1 (1996), into the testimonial privilege frontier. Just as Rule 501 imposes no

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[4] *See Branzburg*, 408 U.S. at 708 ("[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."); *id.* at 710 ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.") (Powell, J., concurring); *see also In re Grand Jury*, 955 F.2d 229, 434 (4th Cir. 1992) (noting *Branzburg*'s observation that First Amendment protects reporter in grand jury proceedings initiated or conducted in bad faith presents a "paradox" because "district courts can control prosecutorial abuse in any setting, not just in cases involving the First Amendment").

"freeze" on the development of the common law, *see Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990); *Trammel*, 445 U.S. at 47, it likewise does not authorize federal courts to mint testimonial privileges for any group—including the "journalistic class," as Judge Sentelle dubs it, Maj. Slip Op. at 15—that demands one. The Supreme Court has warned that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see Branzburg*, 408 U.S. at 690; *see also Jaffee*, 518 U.S. at 21 (Scalia, J., dissenting). Accordingly, we should proceed as cautiously as possible "when erecting barriers between us and the truth," *id.*, recognizing that the Legislature remains the more appropriate institution to reconcile the competing interests—prosecuting criminal acts versus constricting the flow of information to the public—that inform any reporter's privilege to withhold relevant information from a bona fide grand jury. *See Univ. of Penn.*, 493 U.S. at 189.

Because *Jaffee* sits rather awkwardly within a jurisprudence marked by a fairly uniform disinclination to announce new privileges[5] or even expand existing ones,[6] and

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[5] *See Univ. of Penn.*, 493 U.S. 182 (rejecting privilege protecting academic peer-review materials); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege protecting "legislative acts"); *see also Jaffee*, 518 U.S. at 18-36 (Scalia, J., dissenting).

[6] *See United States v. Zolin*, 491 U.S. 554 (1989) (permitting *in camera* review of materials to establish applicability of crime-fraud exception to attorney-client privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (witness spouse's voluntary testimony

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even though it enjoyed the support of an overwhelming majority, I am hesitant to apply its methodology to a case that does not require us to do so. While it would not be the first of its kind, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon* test"); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, __ U.S. __, 124 S. Ct. 2301, 2327 n.1 (2004) ("We have selectively invoked particular tests, such as the '*Lemon* test,' with predictable outcomes." (internal citation omitted)) (Thomas, J., concurring in judgment), the type of multi-factor balancing test Judge Tatel proposes seems, at least to me, to lack analytical rigor because its application to this case is foreordained. Indeed, I am not convinced that a balancing test that requires more than an evaluation of the essentiality of the information to the prosecution and the exhaustion of available alternative sources thereof is either useful or appropriate. While Judge Tatel makes the centerpiece of his test the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," *see* Tatel Slip Op. at 21, this court (in the civil context),[7] the United States Department of Justice[8]

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not covered by spousal privilege); *see also Jaffee*, 518 U.S. at 18-36 (Scalia, J., dissenting).

[7] *Zerilli v. Smith*, 656 F.2d 705, 713-714 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631, 636-38 (D.C. Cir. 1972); *cf. United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (affirming district court's conclusion that reporter's privilege was not overcome because his testimony was not "'essential or crucial'" to defendant's case or relevant to determination of guilt or innocence).

and the lone district court that has recognized a federal common-law reporter's privilege in the grand jury context[9] have declined to consider either of these factors in deciding whether to recognize a reporter's exemption from

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[8] *See* 28 C.F.R. § 50.10. As Judge Tatel points out, *see* Tatel Slip Op. at 20, the Justice Department regulations aim to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice," *id.* § 50.10(a), but the regulations do not balance the two interests. They establish instead that, in requesting authorization to subpoena a member of the press, the government should: reasonably believe that, in a criminal case, the information sought is essential "to a successful investigation—particularly with reference to directly establishing guilt or innocence," *id.* § 50.10(f)(1); attempt unsuccessfully to obtain the information from "alternative nonmedia sources," *id.* § 50.10(f)(3); seek only to verify, "except under exigent circumstances," published information and "such surrounding circumstances as relate to the accuracy of the published information," *id.* § 50.10(f)(4); treat "[e]ven" requests for publicly disclosed information "with care to avoid claims of harassment," *id.* § 50.10(f)(5); and, "wherever possible," seek material information on a limited subject matter and for a limited time period, avoid requiring the production of large quantities of unpublished material and "give reasonable and timely notice of the demand for documents," *id.* § 50.10(f)(6).

[9] *See In re Williams*, 766 F. Supp. 358, 368-70 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (order without treatment of merits).

compulsory process.[10] There is a good reason for this: I suspect that balancing "harm" against "news value" may prove unproductive because in most of the projected scenarios—leaks of information involving, for example, military operations, national security, policy choices or political adversaries—the two interests overlap. Furthermore, *Branzburg* warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes. *See* 408 U.S. at 706 ("By requiring testimony from a reporter in investigations involving some crimes but not in others, [the courts] would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths."). And any evaluation of the importance of newsgathering keyed to its perceived "benefit" to the public, Tatel Slip Op. at 20; *see id.* at 27 ("beneficial newsgathering"), seems antithetical to our nation's abiding commitment to the uninhibited trade in ideas. *See, e.g.*, *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that

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[10] Judge Tatel insists that his test is not "novel . . . , considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines." Tatel Slip Op. at 22. But the central factors of his test—the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," Tatel Slip Op. at 21—find no support that I can detect in those cases. *See* 28 C.F.R. § 50.10; *Zerilli*, 656 F.2d at 713-714; *Carey*, 492 F.2d at 636-38.

speakers, not the government, know best both what they want to say and how to say it."); *Cohen v. California*, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."); *McConnell v. FEC*, 251 F. Supp. 2d 176, 360 (D.D.C. 2003) ("[T]he First Amendment delegates to the populace at large the responsibility of conducting an 'uninhibited, robust, and wide-open' debate." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))); *cf. Gertz v. Welch, Inc.*, 418 U.S. 323, 346 (1974). Moreover, to attempt to establish the contours of a reporter's privilege here would tend, unnecessarily, to leave a future panel less maneuverability in a case that might require just that to achieve justice. On this score, Judge Tatel levels the identical charge against my approach, *see* Tatel Slip Op. at 8, but I fail to see how declining to decide whether a reporter's privilege exists or to define its contours could confine a future panel.

For the foregoing reasons, I am convinced that the court would chart the best course by charting the narrowest one and, accordingly, concur only in the judgment with respect to II.B of the majority opinion. In all other respects, I fully concur.

TATEL, *Circuit Judge*, concurring in the judgment: This case involves a clash between two truth-seeking institutions: the grand jury and the press. On the one hand, the grand jury, a body "deeply rooted in Anglo-American history" and guaranteed by the Fifth Amendment, *see United States v. Calandra*, 414 U.S. 338, 342-43 (1974), holds "broad powers" to collect evidence through judicially enforceable subpoenas. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423-24 (1983). "Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." *Id.* at 424. On the other hand, the press, shielded by the First Amendment, "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). Using language we have quoted with approval, *see Carey v. Hume*, 492 F.2d 631, 634-35 (D.C. Cir. 1974), the Second Circuit aptly described this conflict between press freedom and the rule of law: "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press." *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958).

Because I agree that the balance in this case, which involves the alleged exposure of a covert agent, favors compelling the reporters' testimony, I join the judgment of the court. I write separately, however, because I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), more ambiguous than do my colleagues and because I believe that the consensus of forty-nine states plus the District of Columbia—and even the Department of Justice—would

require us to protect reporters' sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy.

I.

Although I join the court's rejection of appellants' First Amendment argument, I am uncertain that *Branzburg* offers "no support" for a constitutional reporter privilege in the grand jury context. *See* majority op. at 12-13. To be sure, *Branzburg* upheld the enforcement of subpoenas seeking confidential source information, including notes and testimony about interviews and observations at a militant group's headquarters. *See* 408 U.S. at 672-77. Yet even the *Branzburg* majority declared that "news gathering is not without its First Amendment protections," *id.* at 707, a phrase we have interpreted (albeit in dictum) to "indicate[] that a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify," *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). *Branzburg*'s caveat, placed in a discussion of "[o]fficial harassment of the press" and "grand jury investigations . . . instituted or conducted other than in good faith," *Branzburg*, 408 U.S. at 707-08, seems to refer only to journalists' power to quash "unreasonable or oppressive" subpoenas, *see* Fed. R. Crim. P. 17(c)(2). But given that any witness—journalist or otherwise—may challenge such a subpoena, the majority must have meant, at the very least, that the First Amendment demands a broader notion of "harassment" for journalists than for other witnesses. Reinforcing that view, the majority added, "We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 708. That prediction, too, would appear meaningless if no First Amendment safeguards existed for subpoenaed reporters.

Then there is Justice Powell's "enigmatic concurring opinion." *Id.* at 725 (Stewart, J., dissenting). Though providing the majority's essential fifth vote, he wrote separately to outline a "case-by-case" approach, *see id.* at 710 (Powell, J., concurring), that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims. Emphasizing "the limited nature of the Court's holding," *id.* at 709, he wrote:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710. "In short," Justice Powell concluded, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* Even more than the majority opinion, this language places limits on grand jury authority to demand information about source identities—though, again, the precise extent of those limits seems unclear.

Given *Branzburg*'s internal confusion and the "obvious First Amendment problems" involved in "[c]ompelling a reporter to disclose the identity of a confidential source," *Zerilli*, 656 F.2d at 710, it is hardly surprising that lower courts have, as Chief Judge Hogan put it, "chipped away at the holding of *Branzburg*," finding constitutional protections for reporters in "various factual scenarios different than those presented in *Branzburg*." *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). We ourselves have affirmed the denial of a criminal defense subpoena on grounds that the defendant "failed to carry his

burden" of "demonstrat[ing] that the reporters' qualified privilege should be overcome." *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000). In civil litigation, moreover, we have held that the First Amendment requires courts to "look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired." *Carey*, 492 F.2d at 636; *see also Zerilli*, 656 F.2d at 707 (affirming the denial of a motion to compel discovery because "in this case the First Amendment interest in protecting a news reporter's sources outweighs the interest in compelled disclosure"). Other circuits have reached similar conclusions. *See, e.g.*, *United States v. LaRouche Campaign*, 841 F.2d 1176, 1180-81 (1st Cir. 1988) (acknowledging First Amendment limits on criminal defense subpoenas directed at news organizations); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983) (extending a First Amendment reporter privilege developed in civil cases to a criminal defense subpoena); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 593-99 (1st Cir. 1980) (describing First Amendment limits on discovery of reporters' sources in civil litigation); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (indicating that a qualified newsgathering privilege "is no longer in doubt"); *but see In re Grand Jury Proceedings*, 810 F.2d 580, 584-85 (6th Cir. 1987) (rejecting claims of First Amendment privilege in grand jury proceedings).

In this case, however, our hands are tied for two independent reasons. First, although this circuit has limited *Branzburg* in other contexts, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, with respect to criminal investigations we have twice construed that decision broadly. In *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), which addressed a First Amendment challenge regarding access to journalists' phone records and describing *Branzburg* as foreclosing

"case-by-case consideration," we declared, "Good faith investigation interests always override a journalist's interest in protecting his source." *Id.* at 1049 (emphasis added). Echoing this broad view, we have also described Branzburg as "squarely reject[ing]" a claim to "general immunity, qualified or otherwise, from grand jury questioning." *See In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977). In this circuit, then, absent any indication of bad faith, I see no grounds for a First Amendment challenge to the subpoenas at issue here.

Second, although *Branzburg* involved militants and drug dealers rather than government leakers, the factual parallels between that case and this one preclude us from quashing the subpoenas on constitutional grounds. *See* majority op. at 10. If, as *Branzburg* concludes, the First Amendment permits compulsion of reporters' testimony about individuals manufacturing drugs or plotting against the government, *see* 408 U.S. at 667-69, 675-77, all information the government could have obtained from an undercover investigation of its own, the case for a constitutional privilege appears weak indeed with respect to leaks, which in all likelihood will be extremely difficult to prove without the reporter's aid. Thus, if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court.

II.

But *Branzburg* is not the end of the story. In 1975—three years after *Branzburg*—Congress enacted Rule 501 of the Federal Rules of Evidence, authorizing federal courts to develop evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. R. Evid. 501; *see also* Pub. L. No. 93-595, 88 Stat. 1926 (1975). Given *Branzburg*'s instruction that "Congress has freedom to determine whether a statutory newsman's

privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, Rule 501's delegation of congressional authority requires that we look anew at the "necess[ity] and desirab[ility]" of the reporter privilege—though from a common law perspective.

Under Rule 501, that common lawmaking obligation exists whether or not, absent the rule's delegation, Congress would be "the more appropriate institution to reconcile the competing interests . . . that inform any reporter's privilege to withhold relevant information from a bona fide grand jury." Sep. op. at 5 (Henderson, J., concurring) (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)); *but see* sep. op at 4-5 (Sentelle, J., concurring) (observing that even before Rule 501, case law provided federal courts with "precisely the same authority" to recognize common law privileges) (citing *Wolfle v. United States*, 291 U.S. 7, 12 (1934)); *Univ. of Pa.*, 493 U.S. at 189 (declining to recognize a privilege "where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself"). As the Supreme Court has explained, "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984). Thus, subject of course to congressional override, we must assess the arguments for and against the claimed privilege, just as the Supreme Court has done in cases recognizing common law privileges since 1975. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (psychotherapist-patient); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (confidential marital communications).

In this case, just as *Jaffee v. Redmond* recognized a common law psychotherapist privilege based on "the uniform

judgment of the States," 518 U.S. at 14, I believe that "reason and experience" dictate a privilege for reporters' confidential sources—albeit a qualified one. Guided by *Jaffee*'s reasoning, I reach this conclusion by considering first whether "reason and experience" justify recognizing a privilege at all, and if so whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case.

Before undertaking that analysis, I think it helpful to explain why, in my view, we should not, as would Judge Henderson, short-circuit *Jaffee*'s framework and decide whether the special counsel may overcome the reporter privilege without ever reaching the issue of whether the privilege in fact exists. *See* sep. op. at 1 (Henderson, J., concurring). Unless we conclude, as does Judge Sentelle, *see* sep. op. at 1 (Sentelle, J., concurring), and as did the district court, *see In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 18-19 (D.D.C. 2004), that no privilege exists, we cannot resolve this case without adopting some standard. Judge Henderson criticizes my approach, but she never indicates what standard she would apply, except to state that "the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal commonlaw reporter's privilege may erect." *See* sep. op. at 1 (Henderson, J., concurring). To reach even that conclusion, however, one must explain why federal common law cannot support any higher "hurdle," such as an absolute privilege for source identities, which exists in the District of Columbia and several states, *see, e.g.*, D.C. Code Ann. §§ 16-4702, 16-4703(b); 42 Pa. Cons. Stat. § 5942; Ala. Code § 12-21-142, or a privilege that applies unless non-disclosure "will cause a miscarriage of justice," N.D. Cent. Code § 31-01-06.2; *see also* Minn. Stat. § 595.024; N.M. Stat. Ann. § 38-6-7. Without ruling out all such plausible alternatives that would allow the reporters to prevail, how could one know that they cannot prevail here? And without selecting some other test

based on *Jaffee* and Rule 501, how could one know that no such alternatives are plausible?

Because the *Jaffee* analysis is thus essential to resolving this case (assuming a privilege exists), our frequent practice of avoiding non-essential issues is inapplicable. To be sure, declining to resolve waived issues, *see, e.g.*, *Carney v. Am. Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998), disposing of procedurally defective claims without reaching the merits, *see, e.g.*, *Jackson v. District of Columbia*, 254 F.3d 262, 264, 270-71 (D.C. Cir. 2001); *cf. Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891 (D.C. Cir. 1996) (assuming deferential review because even under that standard agency action was unreasonable), and expressing no view on one element of a claim because another element is clearly defective, *see, e.g.*, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989), may well represent "patience in judicial decision-making," sep. op. at 1 (Henderson, J., concurring). Patience, however, cannot justify "declining . . . to define [the disputed privilege's] contours," *see id.* at 9, for that is the dispositive issue in this case.

Accordingly, given that we must apply some test to the government's showing, if we simply assume the privilege exists but our assumption is wrong, then we will have reached out to establish a framework for a non-existent claim—an undertaking hardly consistent with principles of judicial restraint. Indeed, our decision would establish a precedent, potentially binding on future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary. Therefore, I think it imperative to decide as a threshold matter whether the privilege exists, turning only afterwards to the privilege's specific contours.

In this case, moreover, the issue of the privilege's existence is fully briefed, and resolving it definitively will provide critical guidance in similar situations in the future. This is not the only case to raise reporter privilege issues in D.C. federal courts in recent years. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). And given the many leaks that no doubt occur in this city every day, it would be naive to suppose that it will be the last. For the sake of reporters and sources whom such litigation may ensnare, we should take this opportunity to clarify the rules governing their relationship.

Thus, I agree with Judge Sentelle that "the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it." Sep. op. at 1 (Sentelle, J., concurring). Without resolving the first question, we cannot and should not decide the second.

Existence of the Privilege

Under Jaffee, the common law analysis starts with the interests that call for recognizing a privilege. *See* 518 U.S. at 11. If, as the Supreme Court held there, "[t]he mental health of our citizenry is a public good of transcendent importance," id.—one that trumps the "fundamental maxim that the public has a right to every man's evidence," *id.* at 9 (internal quotation marks and ellipsis omitted)—then surely press freedom is no less important, given journalism's vital role in our democracy. Indeed, while the *Jaffee* dissenters questioned psychotherapy's "indispensable role in the maintenance of the citizenry's mental health," *see id.* at 22 (Scalia, J., dissenting), the First Amendment's express protection for "freedom . . . of the press" forecloses any debate about that institution's "important role in the discussion of public affairs," *Mills v. Alabama*, 384 U.S. 214, 219 (1966). "Whatever differences may exist about interpretations of the First Amendment, there is practically

universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills*, 384 U.S. at 218-19).

Like psychotherapists, as well as attorneys and spouses, all of whom enjoy privileges under Rule 501, *see, e.g.*, *Jaffee*, 518 U.S. at 18 (psychotherapists); *Upjohn Co.*, 449 U.S. at 389 (attorneys); *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (spouses), reporters "depend[] upon an atmosphere of confidence and trust," *Jaffee*, 518 U.S. at 10. If litigants and investigators could easily discover journalists' sources, the press's truth-seeking function would be severely impaired. Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner firsthand information about the criminal underworld. Such valuable endeavors would be all but impossible, for just as mental patients who fear "embarrassment or disgrace," *id.*, will "surely be chilled" in seeking therapy, *id.* at 12, so will sources who fear identification avoid revealing information that could get them in trouble.

Because of these chilling effects, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Id.* Consequently, as with other privileges, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* At the same time, although suppression of some leaks is surely desirable (a point to which I shall return), the public harm that would flow from undermining all source relationships would be immense. For example, appellant Judith Miller tells us that her Pulitzer Prize-winning articles on Osama bin Laden's terrorist

network relied on "information received from confidential sources at the highest levels of our government." (Miller Aff. ¶ 10, Appellant's App. at 169.) Likewise, appellant Matthew Cooper maintains that his reports for "*Time*'s four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House" would have been impossible without confidentiality. (Cooper Aff. ¶ 21, Appellant's App. at 286.) Insofar as such stories exemplify the press's role "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve," *Mills*, 384 U.S. at 219, "reason and experience" support protecting newsgathering methods crucial to their genesis. Acknowledging as much in *Zerilli*, we emphasized that "[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability" and weaken "a vital source of information," leaving citizens "far less able to make informed political, social, and economic choices." 656 F.2d at 711.

It is true, as the special counsel observes, that apart from affidavits and citations to two articles in their reply brief, the reporters present no empirical evidence that denial of the privilege "will have a significant impact on the free flow of information protected by the First Amendment." Appellee's Br. at 47. But the Supreme Court has never required proponents of a privilege to adduce scientific studies demonstrating the privilege's benefits. Rather, as the *Jaffee* dissenters pointed out, the empirical question—"[h]ow likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation?"—was one "[t]he Court [did] not attempt to answer." 518 U.S. at 22-23 (Scalia, J., dissenting). Instead, following the wise precept that common sense need not be "the mere handmaiden of social science data or expert

testimonials," *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), *Jaffee* relied on the traditional common law process: it examined the logical prerequisites of the confidential relationship, taking into account the policy and experience of parallel jurisdictions. *See Jaffee*, 518 U.S. at 10 (reasoning that given the need for "frank and complete disclosure of facts, emotions, memories, and fears" in psychotherapy, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

Likewise, in *Trammel v. United States*, while justifying the privilege against adverse spousal testimony in terms of "marital harmony," 445 U.S. at 44-45, 53, the Court allowed waiver by the testifying spouse based not on divorce statistics or psychological studies, but rather on the commonsense supposition that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair," *id.* at 52. And in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), though finding the "empirical information . . . scant and inconclusive," *id.* at 410, the Court held that the attorney-client privilege survives the client's death because "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel," *id.* at 407—a proposition the Court supported with neither evidence nor even citation. Given these decisions, the equally commonsense proposition that reporters' sources will be more candid when promised confidentiality requires no empirical support.

In any event, the special counsel's confidence that exposing sources will have no effect on newsgathering is unjustified. Citing the "'symbiotic' relationships between journalists and public officials," the special counsel presumes that leaks will go on with or without the privilege.

Appellee's Br. at 47 (quoting *Branzburg*, 408 U.S. at 694); *see also* sep. op. at 3 n.3 (Henderson, J., concurring). Not only does this contradict the Justice Department's own guidelines, which expressly recognize that revealing confidential sources can "impair the news gathering function," 28 C.F.R. § 50.10, but the available evidence suggests the special counsel is wrong. As anyone with even a passing interest in news knows, reporters routinely rely on sources speaking on condition of anonymity—a strong indication that leakers demand such protection. Besides, for all the reasons that lead me to conclude that a privilege exists, reporters and their editors, attorneys, and sources probably believe the same, making it speculative indeed for the special counsel to suppose that dashing that expectation of confidentiality would have no effect on newsgathering.

Turning next, as did *Jaffee*, to the consensus among states, I find support for the privilege at least as strong for journalists as for psychotherapists. Just as in *Jaffee*, where "the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege" favored an exercise of federal common lawmaking, *see* 518 U.S. at 12, so here undisputed evidence that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources confirms that "'reason and experience' support recognition of the privilege," *id.* at 13. Indeed, given these state laws, "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation" by exposing confidences protected under state law to discovery in federal courts. *See id.*

Making the case for a privilege here even stronger than in *Jaffee*, federal authorities also favor recognizing a privilege for reporters' confidential sources. As noted earlier, we ourselves have limited discovery of reporters' sources in both civil and criminal litigation, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, as

have other federal courts, *see, e.g.*, *Bruno & Stillman*, 633 F.2d at 593-99; *Burke*, 700 F.2d at 76-77; *Silkwood*, 563 F.2d at 436-37, including some acting on the basis of Rule 501, *see, e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing a qualified common law privilege in civil litigation); *but see In re Grand Jury Proceedings*, 5 F.3d 397, 398 (9th Cir. 1993) (holding that no "scholar's privilege" exists under the First Amendment or common law). In addition, the Justice Department guidelines (though privately unenforceable, for reasons the court explains, *see* majority op. at 20-23) establish a federal policy of protecting "news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." 28 C.F.R. § 50.10. Denial of the privilege, then, would not only buck the clear policy of virtually all states, but would also contradict regulations binding on the federal government's own lawyers.

Resisting this consensus, the special counsel asserts that *Branzburg* already performed the analysis required by Rule 501, thus "resolv[ing] the common law argument." Appellee's Br. at 35; *see also* sep. op. at 1-3 (Sentelle, J., concurring). *Branzburg* did no such thing. As the *Branzburg* majority's very first sentence makes plain, the "issue" in that case was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press *guaranteed by the First Amendment*," 408 U.S. at 667 (emphasis added), not whether it abridged the common law. Later emphasizing the same point, the majority stated, "Petitioners Branzburg and Pappas and respondent Caldwell press *First Amendment claims*." *Id.* at 679 (emphasis added); *see also* sep. op. at 3-4 (Henderson, J., concurring). Indeed, having examined the briefs and lower court opinions, I see no evidence that the parties ever even argued for a separate common law privilege. To be sure, the majority declared that "the great weight of authority is that newsmen are not exempt from the

normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *id.* at 685, but that point served only to reinforce the majority's constitutional holding.

Nor does *Branzburg* support the concurrence's constitutional avoidance theory. *See* sep. op. at 2 (Sentelle, J., concurring). Although the *Branzburg* majority could have avoided the First Amendment claim by recognizing a common law privilege, given that the majority opinion neither did so nor even raised that possibility, *Branzburg*'s holding hardly forecloses the common law argument presented here. Quite the contrary, *Branzburg* acknowledged that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, a power Congress delegated to the federal courts through Rule 501. Thus, if anything, the view that *Branzburg* disposed of the common law privilege gets it backwards. Insofar as *Branzburg* relied on the "great weight of authority" to discern the First Amendment's meaning, *see id.* at 686, the shift in favor of the privilege since that time—from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection—could provide a basis for rethinking *Branzburg*. *Cf. Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002) (overturning prior understanding of Eighth Amendment "cruel and unusual punishment" based on a "consensus" among "the American public, legislators, scholars, and judges" regarding execution of the mentally retarded). Although that is something only the Supreme Court can do, this point underscores the error in seeing *Branzburg* as dispositive.

Given that the common law issue thus remains open, this court must assess the reporters' claim in light of "reason and

experience" today. As *Branzburg* itself observes in describing Congress's powers, privilege rules may require "refashion[ing] . . . as experience from time to time may dictate." 408 U.S. at 706. Bestowing that refashioning power on the federal courts, Rule 501 evidences an "affirmative intention not to freeze the law of privilege," but rather "to leave the door open to change." *Trammel*, 445 U.S. at 47. Consistent with that intent, the Court in *Trammel* modified the privilege against adverse spousal testimony recognized just twenty-two years earlier in *Hawkins v. United States*, 358 U.S. 74 (1958), allowing the testifying spouse to waive the privilege, *see Trammel*, 445 U.S. at 53, even though *Hawkins* had held just the opposite, *see Hawkins*, 358 U.S. at 77-78. Had the Supreme Court addressed a common law claim in *Branzburg*, lower courts might lack authority to reconsider that case's result notwithstanding the subsequent growth in support for the privilege. *But cf. Trammel*, 445 U.S. at 43 (affirming court of appeals decision limiting Hawkins). Absent such a definitive ruling, however, and despite *Branzburg*'s observation about the "great weight of authority" thirty-three years ago, *see* 408 U.S. at 686, we must approach the issue with the same open-mindedness demonstrated by *Trammel*.

For much the same reason, the omission of a reporter privilege from the Judicial Conference Advisory Committee's draft rules submitted to Congress in 1972 (and ultimately replaced by Rule 501) need not dictate the outcome here. True, as the special counsel points out, the Supreme Court in *United States v. Gillock*, 445 U.S. 360, 367-68 (1980), declined to recognize a privilege not appearing in the Advisory Committee draft. As that decision acknowledges, however, the draft rules merely reflected what was "thought to be . . . indelibly ensconced in our common law" at the time. *See id.* Accordingly, when the *Jaffee* Court considered whether the psychotherapist privilege extended to social workers, it relied not on the 1972 draft, which covered

only licensed psychotherapists, but rather on the reasons for the privilege and the state laws in effect when *Jaffee* was decided. *See Jaffee*, 518 U.S. at 15-17 & n.16. Likewise, here, the dramatic growth in support for the reporter privilege supercedes the Advisory Committee's decades-old choice to omit the privilege from its draft.

Equally inconsequential is the adoption of the reporter privilege in thirty-one states through legislation, rather than judicial action. *See* sep. op. at 5 (Sentelle, J., concurring). As the *Jaffee* dissent pointed out, a far greater proportion of states—indeed, every state—established the psychotherapist privilege by statute, *see Jaffee*, 518 U.S. at 25-26 (Scalia, J., dissenting), yet the majority considered that fact "of no consequence," *id.* at 13-14. Nor does it matter that unconventional forms of journalism—freelance writers and internet "bloggers," for example—may raise definitional conundrums down the road. *See* sep. op. at 5-9 (Sentelle, J., concurring); *but see* Eugene Volokh, Opinion, *You Can Blog, But You Can't Hide*, N.Y. Times, Dec. 2, 2004, at A39 ("[T]he rules should be the same for old media and new, professional and amateur. Any journalist's privilege should extend to every journalist."). As *Jaffee* makes clear, "[a] rule," such as Rule 501, "that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner." 518 U.S. at 18. After all, "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California*, 110 U.S. 516, 530 (1884). Here, whereas any meaningful reporter privilege must undoubtedly encompass appellants Cooper and Miller, full-time journalists for *Time* magazine and the *New York Times*, respectively, future opinions can elaborate more refined contours of the privilege—a task shown to be manageable by the experience of the fifty jurisdictions with statutory or common law protections.

In sum, "reason and experience," as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential sources. To disregard this modern consensus in favor of decades-old views, as the special counsel urges, would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 and "freeze the law of privilege" contrary to Congress's wishes, *see Trammel*, 445 U.S. at 47.

Scope of the Privilege

The next step, according to *Jaffee*, is to determine what principles govern the privilege's application in this case. *See Jaffee*, 518 U.S. at 15-16 (deciding first that a psychotherapist privilege exists and only then addressing whether the privilege applies to social workers). Pointing out that many jurisdictions recognize only qualified protection for reporters, the special counsel argues that the uniform judgment of states must support application of the privilege in the precise context at issue—defiance of grand jury subpoenas—before federal courts may recognize it. That view, however, belonged to the *Jaffee* dissent, not the seven-justice majority. Although the dissenters noted an "enormous degree of disagreement among the States as to the scope of the privilege," 518 U.S. at 33 (Scalia, J., dissenting), particularly as to which professions it covered, *see id.* at 27 (Scalia, J., dissenting), the Court extended the privilege to licensed social workers because "[t]he reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker," *id.* at 16-17. Likewise, *Jaffee* rejected a proposed balancing test not because other jurisdictions had done so, but because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would

eviscerate the effectiveness of the privilege." *See id.* at 17-18.

Here, even assuming that some jurisdictions categorically exclude grand jury subpoenas—a proposition for which the special counsel cites no authority—the interests protected by the privilege militate against such a limited approach. Although the public interest in law enforcement may well be at its apex when the government is investigating crime, news stories of paramount First Amendment importance, such as reports about government corruption or wrongdoing, may involve sources who "would surely be chilled," *Jaffee*, 518 U.S. at 12, if they thought grand juries could discover their identities from reporters in whom they confide. Furthermore, the special counsel's proposal is quite anomalous, considering that neither the attorney-client, nor the spousal, nor even the psychotherapist privilege gives way to the grand jury's truth-seeking function. *See, e.g.*, *Swidler & Berlin*, 524 U.S. at 403 (attorney-client); *Blau v. United States*, 340 U.S. 332, 333 (1951) (spousal); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 72 (1st Cir. 1999) (allowing grand jury testimony not because no psychotherapist privilege exists in that context, but rather because a "crime-fraud exception" applies to the privilege).

As to the scope of the privilege, however, I agree with the special counsel that protection for source identities cannot be absolute. Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several CIA operatives in the late 1970s and early 1980s, including the agency's Athens station chief. *See Haig v. Agee*, 453 U.S. 280, 284-85 & n.7 (1981). Other leaks—the design for a top secret nuclear weapon, for example, or plans for an imminent military strike—could be even more damaging, causing harm far in excess of their news value. In such cases, the reporter privilege must give way. Just as attorney-client communications "made for the purpose of

getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships. For example, assuming Miller's prize-winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then-underappreciated threats from al Qaeda. News reports about a recent budget controversy regarding a super-secret satellite program inspire another example (though I know nothing about the dispute's details and express no view as to its merits). *See, e.g.*, Dan Eggen & Walter Pincus, *Justice Reviews Request for Probe of Satellite Reports*, Wash. Post, Dec. 16, 2004, at A3; Douglas Jehl, *New Spy Plan Said to Involve Satellite System*, N.Y. Times, Dec. 12, 2004, at A1. Despite the necessary secrecy of intelligence-gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary by leading Senators from both parties. In contrast to the nuclear weapon and military strike examples mentioned above, cases like these appear to involve a balance of harm and news value that strongly favors protecting newsgathering methods.

Given these contrasting examples, much as our civil cases balance "the public interest in protecting the reporter's sources against the private interest in compelling disclosure," *Zerilli*, 656 F.2d at 712; *see also Carey*, 492 F.2d at 634-36,

so must the reporter privilege account for the varying interests at stake in different source relationships. In other words, to quote the Justice Department subpoena guidelines, "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).

Citing our reporter privilege cases—*Zerilli*, *Carey*, and *Ahn*—the special counsel urges us to rely on two factors deemed "central" in those decisions and emphasized in the Justice Department guidelines: first, the requesting party's need for the evidence, and second, that party's exhaustion of alternative sources. *See Zerilli*, 656 F.2d at 712-14; *Ahn*, 231 F.3d at 37; *Carey*, 492 F.2d at 636-37, 638; 28 C.F.R. § 50.10(b), (f)(1). While both these considerations are obviously essential to minimizing the burden on newsgathering, they can serve as exclusive measures in the privilege analysis only where there exist means of proof other than compelling the reporter's testimony. When prosecuting crimes other than leaks (murder or embezzlement, say) the government, at least theoretically, can learn what reporters know by replicating their investigative efforts, *e.g.*, speaking to the same witnesses and examining the same documents. Accordingly, if a truly exhaustive investigation has failed to prove a crime that the government reasonably believes has occurred, compelled disclosure of a reporter's source may be justified notwithstanding the attendant burdens on newsgathering. As the special counsel acknowledged at oral argument, however, when the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public. The reason for this is obvious: Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority

of leaks will likely be unprovable without evidence from either leaker or leakee. Of course, in some cases, circumstantial evidence such as telephone records may point towards the source, but for the party with the burden of proof, particularly the government in a criminal case, such evidence will often be inadequate.

In leak cases, then, courts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. That framework allows authorities seeking to punish a leak to access key evidence when the leaked information does more harm than good, such as in the nuclear weapon and military strike examples, while preventing discovery when no public interest supports it, as would appear to be the case with Miller's Osama bin Laden articles. Though flexible, these standards (contrary to the special counsel's claim) are hardly unmanageable. Indeed, the Supreme Court employs a similar requirement of "legitimate news interest," meaning "value and concern to the public at the time of publication," in assessing restrictions on government employee speech. *See City of San Diego v. Roe*, __ U.S. __, 125 S. Ct. 521, 526 (2004) (per curiam). Nor is this analysis "novel," *see* sep. op. at 3 (Henderson, J., concurring), considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines.

Though recognizing that leaks with "national security implications" raise different concerns from "information in the nature of 'whistleblowing,'" Appellee's Br. at 44, 48, the special counsel insists that the prosecutor, not the court, should assess factors other than need and exhaustion. Under

this theory, balancing the two remaining concerns, the harmfulness of the leaked information and the damage to newsgathering that might flow from enforcing the disputed subpoenas, would be a matter of prosecutorial discretion. In my view, the special counsel's position distorts the roles of judge and prosecutor in evidentiary disputes.

Although courts certainly defer to executive judgments about which crimes merit prosecution—a judgment that is, after all, a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996)—nonetheless the executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts. *Cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). Indeed, while the criminality of a leak and the government's decision to press charges might well indicate the leak's harmfulness—a central concern of the balancing test—once prosecutors commit to pursuing a case they naturally seek all useful evidence. Consistent with that adversarial role, the Federal Rules of Evidence assign to courts the function of neutral arbiter: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege*, or the admissibility of evidence shall be determined by the court." Fed. R. Evid. 104(a) (emphasis added). Accordingly, just as courts determine the admissibility of hearsay or the balance between probative value and unfair prejudice under Rule 403, so with respect to this issue must courts weigh factors bearing on the privilege.

Moreover, in addition to these principles applicable to the judicial role in any evidentiary dispute, the dynamics of leak inquiries afford a particularly compelling reason for

judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value. Because leak cases typically require the government to investigate itself, if leaks reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value. Of course, in this case a special counsel was appointed to exercise independent judgment. Yet independent prosecutors, too, may skew their assessments of the public interests implicated when a reporter is subpoenaed. After all, special prosecutors, immune to political control and lacking a docket of other cases, face pressure to justify their appointments by bagging their prey. *Cf. Morrison v. Olson*, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (noting "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation" and observing that "the primary check against prosecutorial abuse is a political one"). To be clear: I do not impugn the motives of this special counsel. Indeed, as I conclude below, his pursuit of the reporters' testimony appears reasonable. Nevertheless, these considerations—the special counsel's political independence, his lack of a docket, and the concomitant risk of overzealousness—weigh against his claim to deference in balancing harm against news value.

Paralleling the special counsel's argument about executive discretion, my concurring colleague suggests that my approach pays insufficient deference to Congress. *See* sep. op. at 8 (Henderson, J., concurring). "*Branzburg*," she writes, "warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes." *See id.* Although it is true that *Branzburg* cautioned against second-guessing the "legislative judgment . . . of what conduct is liable to criminal prosecution," 408 U.S. at 706, it did so in a passage rejecting a test of governmental need that apparently "distinguish[ed] between the value of enforcing different criminal laws," deeming some statutes "compelling" and

others unimportant. *See id.* at 702, 705-06. The approach I propose entails no such judgment about the value of the statute under which the government is proceeding. Rather, my approach focuses on whether evidence the government believes it needs, *i.e.*, a reporter's testimony about a particular source, is privileged. To be sure, insofar as the reporter's testimony is critical in a particular case, privileging the evidence may render that case unprovable. But that risk accompanies any privilege or indeed any rule of evidentiary exclusion. Had Congress believed that judicial decisions excluding evidence interfered with its "legislative judgment" regarding underlying crimes, it would hardly have authorized recognition of common law privileges by enacting Rule 501.

Furthermore, and perhaps even more important, *Branzburg* addressed only a First Amendment privilege claim. *See supra* at 14. In that case, therefore, because Congress cannot overturn constitutionally based decisions, recognizing the asserted privilege would have permanently foreclosed punishment of any crimes dependent on proof subject to the privilege. The qualified privilege I would recognize, however, rests on Rule 501, not the Constitution. If Congress believes that this approach overrides its judgment about what conduct should be criminal, it may simply overturn the privilege and authorize use of the evidence.

Next, the special counsel argues that waivers signed by suspected sources represent an "additional factor" favoring compulsion of the reporters' testimony. Appellee's Br. at 46. As the reporters point out, however, numerous cases (including persuasive district court decisions from this circuit) indicate that only reporters, not sources, may waive the privilege. *See, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198-99 (D.D.C. 1978). For the contrary proposition, the special counsel cites *McKevitt v. Pallasch*,

339 F.3d 530 (7th Cir. 2003), but that case involved a criminal defendant's effort to obtain non-confidential records from the biographers of a government witness, not waiver of confidentiality by a previously unidentified source. *See id.* at 531, 533-34. Nor does *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002), help the special counsel. While that decision indicated that "'the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in nondisclosure,'" *id.* at 120 (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)), it quashed the subpoena at issue, reasoning that "the privilege for journalists shields both confidential and nonconfidential information from compelled disclosure," *id.*

As this case law recognizes, a source's waiver is irrelevant to the reasons for the privilege. Because the government could demand waivers—perhaps even before any leak occurs—as a condition of employment, a privilege subject to waiver may, again, amount to no privilege at all, even in those leak cases where protecting the confidential source is most compelling. Moreover, although the attorney-client and psychotherapist privileges are waivable by clients and patients, respectively, *see, e.g.*, *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (attorney-client); *Jaffee*, 518 U.S. at 15 n.14 (psychotherapist), that is because those privileges exist to prevent disclosure of sensitive matters related to legal and psychological counseling, *see, e.g.*, *Swidler & Berlin*, 524 U.S. at 407-08; *Jaffee*, 518 U.S. at 10-11, a rationale that vanishes when the source authorizes disclosure. In contrast, the reporter privilege safeguards public dissemination of information—the reporter's enterprise, not the source's.

Consistent with that purpose, the privilege belongs to the reporter. Not only are journalists best able to judge the imperatives of newsgathering, but while the source's interest

is limited to the particular case, the reporter's interest aligns with the public, for journalists must cultivate relationships with other sources who might keep mum if waiving confidentiality at the government's behest could lead to their exposure. Indeed, as compared to counseling-related privileges, the privilege against spousal testimony represents a better analogy. Just as under *Trammel*'s waiver theory testifying spouses, regardless of the other spouse's wishes, may judge for themselves whether their testimony will undermine "marital harmony," *see Trammel*, 445 U.S. at 44-45, 52-53, so should journalists—the experts in newsgathering—base the decision to testify on their own assessment of the consequences, unconstrained by their source's waiver (provided other requirements of the privilege are met).

For their part, appellants insist that a qualified privilege fails to provide the certainty their work requires because sources are unlikely to disclose information without an advance guarantee of secrecy. In particular, they argue that journalists cannot balance a leak's harm against its news value until they know what information the source will reveal, by which time it is too late to prevent disclosure. True enough, but journalists are not the ones who must perform the balancing; sources are. Indeed, the point of the qualified privilege is to create disincentives for the source—disincentives that not only promote the public interest, but may also protect journalists from exploitation by government officials seeking publication of damaging secrets for partisan advantage. Like other recipients of potentially privileged communications—say, attorneys or psychotherapists—the reporter can at most alert the source to the limits of confidentiality, leaving the judgment of what to say to the source. While the resulting deterrent effect may cost the press some leads, little harm will result, for if the disincentives work as they should, the information sources

refrain from revealing will lack significant news value in the first place.

In any event, although *Jaffee* said that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation . . . [will] eviscerate the effectiveness of the privilege," 518 U.S. at 17, the clash of fundamental interests at stake when the government seeks discovery of a reporter's sources precludes a categorical approach. *See Zerilli*, 656 F.2d at 712 n.46 (rejecting arguments for greater "specificity" as to the scope of the First Amendment privilege in civil litigation). And as we explained in *Zerilli*, the "deterrence effect" on beneficial newsgathering will be small if courts make clear that the privilege is "overridden only in rare circumstances." *See id.* at 712 & n.46.

In short, the question in this case is whether Miller's and Cooper's sources released information more harmful than newsworthy. If so, then the public interest in punishing the wrongdoers—and deterring future leaks—outweighs any burden on newsgathering, and no privilege covers the communication (provided, of course, that the special counsel demonstrates necessity and exhaustion of alternative evidentiary sources).

III.

Applying this standard to the facts of this case, and considering first only the public record, I have no doubt that the leak at issue was a serious matter. Authorized "to investigate and prosecute violations of any federal criminal laws related to the underlying alleged unauthorized disclosure, as well as federal crimes committed in the course of, and with intent to interfere with, [his] investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses," *see* Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois (Feb. 6, 2004), the special counsel is attempting to discover the origins of

press reports describing Valerie Plame as a CIA operative monitoring weapons of mass destruction. *See* majority op at 3-5. These reports appeared after Plame's husband, former Ambassador Joseph Wilson, wrote in a *New York Times* op-ed column that his findings on an official mission to Niger in 2002 cast doubt on President Bush's assertion in his January 2003 State of the Union address that Iraq "recently sought significant quantities of uranium from Africa." *See id.* at 3.

An alleged covert agent, Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago. *See, e.g.*, Richard Leiby & Dana Priest, *The Spy Next Door; Valerie Wilson, Ideal Mom, Was Also the Ideal Cover*, Wash. Post, Oct. 8, 2003, at A1. Her exposure, therefore, not only may have jeopardized any covert activities of her own, but also may have endangered friends and associates from whom she might have gathered information in the past. Acting to criminalize such exposure of secret agents, *see* 50 U.S.C. § 421, Congress has identified that behavior's "intolerable" consequences: "[t]he loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure." S. Rep. No. 97-201, at 10-11 (1981), *reprinted in* 1982 U.S.C.C.A.N. 145, 154-55.

The leak of Plame's apparent employment, moreover, had marginal news value. To be sure, insofar as Plame's CIA relationship may have helped explain her husband's selection for the Niger trip, that information could bear on her husband's credibility and thus contribute to public debate over the president's "sixteen words." Compared to the damage of undermining covert intelligence-gathering, however, this slight news value cannot, in my view, justify privileging the leaker's identity.

Turning now to the classified material, I agree with the special counsel that ex parte review presents no due process difficulty. To be sure, grand jury secrecy is not absolute. As Rule 6(e) itself provides, courts may "authorize disclosure ... of a grand jury matter ... preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E). In addition, as the reporters point out, even apart from *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973), now superceded by *United States v. Mara*, 410 U.S. 19 (1973), *see* majority op at 19 (citing *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975)), the Second and Ninth Circuits have held that due process requires an "uninhibited adversary hearing" in civil contempt proceedings, *see United States v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) (internal quotation marks omitted); *In the Matter of Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) (internal quotation marks omitted), including "the right to confront all the government's evidence, both documentary and testimonial, unless particular and compelling reasons peculiar to the grand jury function require some curtailment of [that] right," *Kitchen*, 706 F.2d at 1272.

In this circuit, however, we have approved the use of "*in camera, ex parte* proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam). Just as due process poses no barrier to forcing an attorney to testify based on the court's examination of evidence, unseen by the lawyer, that the client sought legal advice in pursuit of a crime, neither does it preclude compulsion of a reporter's testimony based on a comparable review of evidence, likewise unseen by the reporter, that a source engaged in a harmful leak. In fact, appellants' protests notwithstanding, ex parte review protects their interests, as it allows the

government to present—and the court to demand—a far more extensive showing than would otherwise be possible given the need for grand jury secrecy discussed in the court's opinion, *see* majority op at 17-18.

That said, without benefit of the adversarial process, we must take care to ensure that the special counsel has met his burden of demonstrating that the information is both critical and unobtainable from any other source. Having carefully scrutinized his voluminous classified filings, I believe that he has.

With respect to Miller, * * * * * [REDACTED] * * * * *

Regarding Cooper, * * * * * [REDACTED] * * * * *

In sum, based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony. Thus, considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas.

One last point. In concluding that no privilege applies in this case, I have assigned no importance to the fact that neither Cooper nor Miller, perhaps recognizing the irresponsible (and quite possibly illegal) nature of the leaks at issue, revealed Plame's employment, though Cooper wrote about it after Novak's column appeared. Contrary to the reporters' view, this apparent self-restraint spares Miller and Cooper no obligation to testify. Narrowly drawn limitations on the public's right to evidence, testimonial privileges apply "only where necessary to achieve [their] purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and in this case the privilege's purpose is to promote dissemination of useful information. It thus makes no difference how these reporters responded to the information they received, any more than it matters whether an attorney drops a client who seeks criminal advice (communication subject to the crime-fraud exception) or a psychotherapist seeks to dissuade homicidal plans revealed during counseling (information *Jaffee* suggested would not be privileged, *see* 518 U.S. at 18 n.19). In all such cases, because the communication is unworthy of protection, recipients' reactions are irrelevant to whether their testimony may be compelled in an investigation of the source.

Indeed, Cooper's own *Time*.com article illustrates this point. True, his story revealed a suspicious confluence of leaks, contributing to the outcry that led to this investigation. Yet the article had that effect precisely because the leaked information—Plame's covert status—lacked significant news value. In essence, seeking protection for sources whose nefariousness he himself exposed, Cooper asks us to protect

criminal leaks so that he can write *about* the crime. The greater public interest lies in preventing the leak to begin with. Had Cooper based his report on leaks about the leaks—say, from a whistleblower who revealed the plot against Wilson—the situation would be different. Because in that case the source would not have revealed the name of a covert agent, but instead revealed the fact that others had done so, the balance of news value and harm would shift in favor of protecting the whistleblower. Yet it appears Cooper relied on the Plame leaks themselves, drawing the inference of sinister motive on his own. Accordingly, his story itself makes the case for punishing the leakers. While requiring Cooper to testify may discourage future leaks, discouraging leaks of this kind is precisely what the public interest requires.

IV.

I conclude, as I began, with the tensions at work in this case. Here, two reporters and a news magazine, informants to the public, seek to keep a grand jury uninformed. Representing two equally fundamental principles—rule of law and free speech—the special counsel and the reporters both aim to facilitate fully informed and accurate decision-making by those they serve: the grand jury and the electorate. To this court falls the task of balancing the two sides' concerns.

As James Madison explained, "[A] people who mean to be their own Governors must arm themselves with the power which knowledge gives." *See In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910)). Consistent with that maxim, "[a] free press is indispensable to the workings of our democratic society," *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring), and because confidential sources are essential to the

workings of the press—a practical reality that virtually all states and the federal government now acknowledge—I believe that "reason and experience" compel recognition of a privilege for reporters' sources. That said, because "[l]iberty can only be exercised in a system of law which safeguards order," *Cox v. Louisiana*, 379 U.S. 559, 574 (1965), the privilege must give way to imperatives of law enforcement in exceptional cases.

Were the leak at issue in this case less harmful to national security or more vital to public debate, or had the special counsel failed to demonstrate the grand jury's need for the reporters' evidence, I might have supported the motion to quash. Because identifying appellants' sources instead appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony.

APPENDIX B

United States District Court,

District of Columbia.

In re: SPECIAL COUNSEL INVESTIGATION

Nos. MISC.04-296(TFH), MISC.04-297(TFH).

July 20, 2004.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

Pending before the Court are two motions to quash subpoenas filed by journalists, Matthew Cooper and Tim Russert. The subpoenas were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame. Specifically, *Time* magazine reporter Matthew Cooper and NBC Washington Bureau Chief Tim Russert were asked to appear before the grand jury to testify regarding alleged conversations they had with a specified Executive Branch official. Because this Court holds that the U.S. Supreme Court unequivocally rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith, this Court denies the motions to quash.

Background

On July 6, 2003, the *New York Times* published former Ambassador Joseph Wilson's column "What I Didn't Find in Africa," in which he charged that President Bush had "twisted" intelligence related to Iraq's nuclear program in his 2003 State of the Union Address. After the article was published, Ambassador Wilson's article and other statements he made to members of the media were extensively reported on by a number of news outlets. Motion of Non-Party Tim Russert to Quash Grand Jury Subpoena ("Russert Mot.") at 2-3.

On July 14, 2003, the *Washington Post* and other newspapers published a column written by Robert Novak in which he identified Ambassador Wilson's wife, Valerie Plame, as a CIA Officer. Specifically, the article reported that Ambassador Wilson's "wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger." Russert Mot. at 3. Two months after that article was published, the *Post* reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." *Id.*

In December 2003, the Department of Justice appointed United States Attorney Patrick Fitzgerald as Special Counsel to investigate the allegations that one or more Executive Branch officials unlawfully disclosed the name of a purported covert CIA operative, Valerie Plame. Russert Mot. at 3. On May 21, 2004, grand jury subpoenas were issued to Mr. Cooper and Mr. Russert. Subsequent discussions between each reporter's respective attorneys and Special Counsel revealed that Mr. Fitzgerald intended to question each journalist about alleged discussions they had with a specified Executive Branch official. The specific subject matter Special Counsel will address before the grand jury is quite circumscribed, but it does delve into alleged conversations each

reporter had with a confidential source. Russert Mot. at 4; Motion of Matthew Cooper to Quash Subpoena and/or for Protective Order ("Cooper Mot.") at 6-7.

Mr. Cooper and Mr. Russert base their motions to quash the grand jury subpoenas on the grounds that they violate the reporters privilege embodied in the First Amendment and common law. They also point to the D.C. Shield Law, D.C. Code Ann. §§ 16-4702(1), 4703(b) (2001) and the Department of Justice's own policy statements regarding the issuance of subpoenas to members of the press, 26 C.F.R. § 50.10, as further support that the subpoenas should be quashed. In addition to the papers submitted in opposition to the motions to quash, Mr. Fitzgerald submitted an *ex parte* affidavit filed under seal. Government's Response to Motion to Quash Grand Jury Subpoena [re: Cooper] ("Gov't Opp'n to Cooper") at 1.

Analysis

This Court need not search far to find a case which directly addresses the issues currently before it. In *Branzburg v. Hayes,* the United States Supreme Court squarely addressed the application of a reporters privilege in the context of a grand jury. *Branzburg v. Hayes*, 408 U.S. 665 (1972). In that case, the Supreme Court consolidated into one opinion four cases involving journalists who were subpoenaed before grand juries and asked to testify about, *inter alia,* the identity of informants and information they had been told in confidence. The reporters objected to the subpoenas based on their rights under the First Amendment. *Id.* at 672.

In the Court's opinion, Justice White explained that any incidental burden that testifying before a grand jury may have on the journalists was far outweighed by society's interest is law enforcement. *Branzburg,* 408 U.S. at 690-91. The Court acknowledged the vital, constitutionally mandated role that grand juries have in the government's fundamental function of ensuring "[f]air and effective law enforcement aimed

at providing security for the person and property of the individual." *Id.* It is the responsibility of every citizen to appear before a grand jury in order to assist that body with its essential tasks. *Id.* at 682.

The *Branzburg* Court held that the First Amendment concerns should not alter news-gatherers' obligations to testify before grand juries because asking members of the press to appear before the grand juries "involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." *Id.* at 681. The journalists were not being forbidden from continuing to use confidential sources, nor were they being asked to indiscriminately disclose the identity of their sources upon request. *Id.* at 681-82. The Court acknowledged that the reporters' argument that the dissemination of news to the public would be diminished by forcing members of the press to testify before grand juries was a rational concern. This fear, however, did not carry much weight with the Court which found that evidence of such an inhibiting effect of grand jury subpoenas was "widely divergent and to a great extent speculative." *Id.* at 693-94. "We cannot accept the argument that the public interest in possible future news about crime . . . . must take precedence over the public interest in pursuing and prosecuting those crimes." *Id.* at 695. The *Branzburg* Court held that there is no First Amendment privilege exempting members of the press from appearing before grand juries upon issuance of a valid subpoena. Furthermore, common law provides no such reporters privilege. *Id.* at 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."). In the absence of a grand jury acting in bad faith or with the sole purpose of harassment, *Branzburg* makes clear that neither the First Amendment nor common law protect reporters from

their obligations shared by all citizens to testify before the grand jury when called to do so.

Rather than agreeing that no reporters privilege exists in the grand jury context, Petitioners assert that *Branzburg* actually stands for the proposition that reporters enjoy a qualified privilege under the First Amendment and courts should employ a balancing test when faced with a reporter subpoenaed before a grand jury. Cooper Mot. at 8-10; Russert Mot. at 7-8. This argument fails for many reasons The *Branzburg* Court explicitly rejected the idea that a qualified privilege exists in the grand jury context when that grand jury is acting in good faith. *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972). Justice White explained that a qualified privilege would not be feasible because it would present practical and conceptual difficulties for courts such as requiring them to define the categories of journalists who qualified for the privilege – an extremely difficult task under the Court's First Amendment jurisprudence. *Id.* at 703-04. Courts would be forced to answer questions that would embroil them in preliminarily determinations such as whether there is probable cause to believe a crime has been committed, whether there is a sufficient likelihood that the journalist has useful information, and most suspect, whether protecting society against a specific type of criminal activity is more important than protecting a reporter's rights. *Id.* at 705-06. The Court refused to require courts to become involved in such an analysis, and therefore, expressly refused to find that the press has any qualified privilege against testifying before a grand jury.

Petitioners rest their claim that *Branzburg* stands for a qualified privilege for reporters on the assumption that the holding of in the case is controlled by Justice Powell who joined the majority opinion, but issued a separate concurrence. Cooper argues that in a 5-4 majority where a member of the majority writes a separate concurring opinion as is the case in *Branzburg*, the concurring opinion "represents the

holding of the Court on the rationale that the majority opinion is not a true majority except to the extent that it accords with the views of the concurrence." Cooper Mot. at 9 n.21. Movants further support this position by citing to various courts who have quoted Powell's concurring opinion when referencing the holding of the Branzburg Court. *See, e.g. Zerilli v. Smith,* 656 F.2d 705 (D.C. Cir. 1981). This Court disagrees with that position. As Special Counsel points out "Justice Powell's concurring opinion is not a separate opinion concurring only in the judgement. Justice Powell was one of five Justices joining Justice White's opinion for the court, so Justice White's opinion is a majority opinion and not a plurality opinion." Gov't Opp'n to Cooper at 8 n.1. More importantly, it is the view of this Court that Powell's concurrence is entirely consistent with the holding of the majority in *Branzburg.*

In his concurrence, Justice Powell elaborates on the Court's statement that grand juries brought in bad faith may not harass members of the press. He clarifies that if the reporter has any reason to believe that "his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg,* 408 U.S. at 710 (Powell, J., concurring). This Court holds that the balancing test Justice Powell refers to should only be undertaken when a reporter is asked to testify before a grand jury "without a legitimate need of law enforcement." *Id.* "The balancing of interests suggested by Justice Powell is in the limited circumstances he mentioned, where there is, in effect, an abuse of the grand jury function. If Justice Powell's concurrence is read more broadly, it would be inconsistent with Justice White's opinion with which he concurred."

In re Grand Jury Proceedings, 5 F.3d 397, 401 (9th Cir. 1993). This reading is further supported by the fact that Justice Powell explicitly rejects the qualified privilege advocated by the dissent. *Branzburg,* at 710 n.*. Although Justice Powell does refer to the necessity of a proper balance of the societal interests involved, "it is clear that he is actually referring to the availability of judicial case-by-case screening out for Bad faith 'improper and prejudicial' interrogation. Indeed this court has already so interpreted Justice Powell's opinion in *In re Possible Violations of 371, 641, 1503,* 184 U.S.App.D.C. 82, 564 F.2d 567 (1977)." *Reporters Comm. for Freedom of Press v. American Telephone & Telegraph Co.,* 593 F.2d 1030, 1061 n.107 (D.C. Cir. 1978); *see also In re Grand Jury Proceedings,* 810 F.2d 580, 585 (6th Cir. 1987) ("Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding, but that, instead, it responds to what Justice Powell perceived as an unwarranted characterization of that holding by Justice Stewart."); *In re Grand Jury 95-1,* 59 F. Supp. 2d 1, 14 (D.D.C. 1996) ("[T]his Court finds that Justice Powell's concurring opinion is consistent with Justice White's majority opinion in *Branzburg.* Both opinions found that no testimonial privilege exists for newsmen which does not exist for other citizens.")

Only two federal circuits courts have directly addressed the issue of a reporter's privilege in the grand jury context, and both of those courts held that there was no privilege. *See In re Grand Jury Proceedings, Storer Communications, Inc.,* 810 F.2d 580 (6th Cir. 1987); *Lewis v. United States,* 517 F.2d 236 (9th Cir. 1975). One district court held that there is a common law qualified newsman's privilege in the grand jury context. *In re Grand Jury Subpoena of Williams,* 766 F. Supp. 358 (W.D.Pa. 1991) *aff'd* 963 F.2d 567 (3rd Cir. 1992)

(en banc) (dispositive order without discussion of merits).[1] This Court declines to follow that case "on the ground that it directly conflicts with the Supreme Court's holding in *Branzburg.*" *In re Grand Jury Proceedings,* 5 F.3d 397, 403 (9th Cir. 1993). Other circuits have demonstrated adherence to *Branzburg* 's assertion that there is no reporter's privilege except in the face of a grand jury acting in bad faith. *See In re Grand Jury Proceedings,* 5 F.3d 397, 401-03 (9th Cir. 1993) (court denied motion to quash a subpoena served on a "scholar" based on the reasoning of *Branzburg* holding there is no privilege in the absence of bad faith); *In re Grand Jury 87-3 Subpoena Duces Tecum,* 955 F.2d 229, 232-34 (4th Cir. 1992) (subpoena seeking corporate records upheld after applying *Branzburg* standard); *United States v. Smith,* 135 F.3d 963, 968-70 (5th Cir. 1998) (reporters subpoenaed and not protected from the subpoena based on *Branzburg* analysis).

The Circuit Court for the District of Columbia has upheld the holding of *Branzburg. Reporters Comm. for Freedom of Press v. American Telephone & Telegraph Co.,* 593 F.2d 1030, 1061 (D.C. Cir. 1978) ("The Court in *Branzburg* determined that Good faith criminal investigation interests Always override a journalist's interest in preserving the secrecy of his sources."); *In re Possible Violations of 18*

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[1] The *Williams* court supported its holding by explaining that the adoption of Federal Rule of Evidence 501 required privileges to be governed by the principles of common law. It then applied a reporters privilege which the Third Circuit had created in a *civil* case to the grand jury context. 766 F. Supp. at 367-68. This Court finds that the application of a reporters privilege applicable in the civil context to a case involving a grand jury subpoena is flawed and directly inconsistent with the Supreme Court's holding in *Branzburg.*

U.S.C. 371, 641, 1503, 564 F.2d 567, 571 (D.C. Cir. 1977) (concluding that *Branzburg* established a "newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith or for the purpose of harassment, he can call on the courts for protection."). The D.C. District court has followed suit. *In re Grand Jury 95-1,* 59 F. Supp. 2d 1, 10-15 (D.D.C. 1996) (adopting *Branzburg* 's holding and analysis in rejecting journalist's motion to quash a grand jury subpoena).

It is true that some courts have chipped away at the holding of *Branzburg* by ruling that a court shall apply a qualified privilege in certain limited contexts. These courts have done so by carving out various factual scenarios different than those presented in *Branzburg* and announcing that a judge should apply a balancing test. *United States v. Ahn,* 231 F.3d 26 (D.C. Cir. 2000) (criminal case addressing "breach of contract" issue); *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir. 1988) (pre-trial criminal proceeding); *United States v. Burke,* 700 F.2d 70 (2d Cir. 1983) (criminal trial); *Zerilli v. Smith,* 656 F.2d 705 (D.C. Cir. 1981) (civil proceeding); *United States v. Hubbard,* 493 F. Supp. 202 (D.D.C. 1979) (criminal case); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974) (civil proceeding); *Baker v. F & F Investment,* 470 F.2d 778 (2d Cir. 1972) (civil action). In all of those cases noted by the petitioner, there was no Supreme Court precedent for the factual situation they were faced with indicating how they must rule. This court does not share that luxury. Whatever extent lower courts around the country have eroded the periphery of the *Branzburg* opinion, the core of the opinion stands strong. The facts of this case fall entirely within that core – a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection. In the three decades since that opinion was penned, the Supreme Court has chosen not to issue a

ruling contradicting that holding. Therefore, neither shall this Court.

Petitioner Russert attempts one last time to steer the court away from the inevitable holding in Branzburg by arguing that the case did not deal with confidential sources and that other courts have identified confidential sources as unique situations. (Russert Tr. at 15-20.) Russert argues that the relevant distinction is not between grand juries and all other judicial proceedings. Rather, petitioner submits, the relevant distinction is between cases when the government seeks to question a journalist about a confidential source and "those cases – like *Branzburg* – in which a journalist, like any other citizen, is obliged to testify about criminal conduct that he observed." Reply Memorandum of Points and Authorities in Support of Non-Party Tim Russert's Motion to Quash Grand Jury Subpoena at 5. "This Court agrees with the Independent Counsel that the line should be drawn at the nature of the proceeding; not depending on how the reporter obtained the information at issue." *In re Grand Jury 95-1,* 59 F. Supp. 2d 1, 13 (D.D.C. 1996). Petitioner's interpretation of *Branzburg* is again inaccurate. Although some of the reporters in *Branzburg* did observe criminal conduct, one of the reporters did not observe any criminal conduct and was asked to testify about information he had learned from confidential sources. *Branzburg,* 408 U.S. at 672-73. More importantly, the entire *Branzburg* opinion is laced with references to confidential sources and Justice White makes clear that the "heart of the [reporters'] claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." *Id.* at 681. The *Branzburg* opinion's holding that there is no First Amendment or common law reporters privilege in the grand jury context plainly encompasses journalists asked to reveal confidential sources and information.

Two other arguments proffered by the movants merit a response. First, movants point to the District of Columbia Shield Law, D.C. Code Ann. §§ 16-4702-4703 (2001), as a secondary basis for the Court to quash the journalists' subpoenas. The Court disagrees. The federal law of privilege exclusively governs evidentiary privileges in cases arising under federal substantive law in federal court. Fed.R.Evid. 501. "Whatever may be its force in the context of a civil common law action in a court of the District of Columbia .... the D.C. statute is inapplicable here. Congress has never enacted a federal counterpart to the D.C. Shield Law." *Lee v. United States Dep't of Justice,* 287 F. Supp. 2d 15, 17 (D.D.C. 2003). Second, Cooper and Russert assert that the subpoenas must be quashed because the Department of Justice Guidelines for issuing subpoenas to news media ("DOJ guidelines") were not met. 26 C.F.R. § 50.10. This Court is not convinced that the DOJ guidelines vest any right whatsoever in movants.[2] Assuming, *arguendo,* that the DOJ guidelines did vest a right in the movants in these cases, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald. Furthermore, assuming *arguendo* that this Court were to determine that the journalists did possess a qualified privilege – a holding which this Court has explained is simply not supported by case law – the *ex parte*

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[2] See 28 C.F.R. § 50.10(n) ("The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person."); *In re Grand Jury Subpoena Am. Broad. Cos., Inc.,* 947 F. Supp. 1314, 1322 (E.D. Ark. 1996) (denying television network's request to quash grand jury subpoena on the basis that DOJ guidelines were not fulfilled because DOJ "regulations, by their own terms, confer no enforceable right on the subpoenaed person.").

affidavit has also established that Special Counsel would be able to meet even the most stringent of balancing tests. The information requested from Mr. Cooper and Mr. Russert is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt. To be clear, this Court holds that Cooper and Russert have no privilege, qualified or otherwise, excusing them from testifying before the grand jury in this matter. There have been no allegations whatsoever that this grand jury is acting in bad faith or with the purpose of harassing these two journalist. Therefore, under the holding in *Branzburg* and its progeny, Mr. Cooper and Mr. Russert must fulfill their obligation, shared by all citizens, to answer a valid subpoena issued to them by a grand jury acting in good faith. An appropriate order will accompany this opinion.

July 20, 2004

/s/

Thomas F. Hogan

Chief Judge

ORDER

Pending before the Court are "Motion of Matthew Cooper to Quash Subpoena and/or for Protective Order" and "Motion of Non-Party Tim Russert to Quash Grand Jury Subpoena." For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that both motions are **DENIED**.

SO ORDERED.

APPENDIX C

United States District Court,

District of Columbia.

In re: SPECIAL COUNSEL INVESTIGATION

Nos. MISC.04-296(TFH), 04-379(TFH).

Aug. 9, 2004.

ORDER

THOMAS F. HOGAN, District Judge.

Pending before the Court is the Motion of the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, to hold witnesses Matthew Cooper and TIME Inc. in civil contempt of court pursuant to 28 U.S.C. § 1826. After conducting a hearing on August 6, 2004 and being fully advised, this Court finds as follows:

1. Matthew Cooper, having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied the motion to quash for the reasons stated in its Memorandum Opinion dated July 20, 2004.

2. Matthew Cooper has, in person and through counsel, refused to comply with the grand jury subpoena without just cause.

3. Based on this refusal, Matthew Cooper is in civil contempt of this Court.

4. TIME Inc., having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied the motion to quash on August 6, 2004, for the reasons stated in its Memorandum Opinion dated July 20, 2004.

5. TIME Inc., through counsel, refused to comply with the grand jury subpoena without just cause.

6. Based on this refusal, TIME Inc. is in civil contempt of this Court.

7. Matthew Cooper and TIME Inc. have indicated their intention to pursue an appeal of this Court's order to United States Court of Appeals for the District of Columbia Circuit, and have agreed to file notices of appeal within two business days of the entry of this order. The parties have agreed to propose an expedited briefing schedule in the Court of Appeals requiring the filing of appellant's brief twelve days after the filing of notice of appeal, the filing of appellee's brief seven days after the filing of appellant's brief, and the filing of appellant's reply three days thereafter.

8. The appeals of Matthew Cooper and TIME Inc. are brought in good faith and present substantial legal questions.

Based on the foregoing findings of fact, and for the reasons stated in open court, it is hereby

ORDERED that:

1. Matthew Cooper is ordered confined at a suitable place until such time as he is willing to comply with the grand jury subpoena. The period of confinement shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months.

2. TIME Inc. is ordered to pay a fine of $1,000 per day until such time as it is willing to comply with the grand jury subpoena. The term of the fine shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months.

3. The order of confinement as to Matthew Cooper, and the fine ordered as to TIME Inc., are stayed, and Matthew Cooper is granted bail pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

4. The following portions of the record will be unsealed: (a) Order and Memorandum Opinion dated July 20, 2004; (b) Response of Matthew Cooper to Motion of Government for Entry of Order to Show Cause; (c) Government's Memorandum Regarding Contempt Proceeding; and (d) transcript of the August 6, 2004 hearing.

5. All other submissions and court proceedings relating to the subject grand jury subpoenas and motions to quash will remain under seal until further order of the Court.

SO ORDERED.

August 9, 2004 /s/

The Honorable Thomas F. Hogan

United States District Judge

APPENDIX D

United States District Court,

District of Columbia.

In Re: SPECIAL COUNSEL INVESTIGATION

No. 04-407 (TFH).

Sept. 9, 2004.

Order unsealing Order & Memorandum Sept. 15, 2004.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

Pending before the Court is Motion of Judith Miller to Quash Grand Jury Subpoenas and/or for Protective Order. The subpoenas were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame. Ms. Miller is a journalist who was asked to appear before the grand jury to testify regarding alleged conversations she had with a specified Executive Branch official. For the reasons set forth in this Court's July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297, as well as the additional reasons stated below, the Court denies the motion to quash.

Background

The facts surrounding this case are outlined in the Court's Memorandum Opinion of July 20, 2004, and therefore the Court will only briefly address Ms. Miller's role in case. Judith Miller is an investigative reporter for *The New York Times*. Although Ms. Miller never wrote an article about Ambassador Joseph Wilson or his wife Valerie Plame, she contemplated writing one. In preparation, Ms. Miller spoke with one or more confidential sources regarding Ambassador Wilson's article, "What I Didn't Find in Africa." Affidavit of Judith Miller ¶¶ 1,5. The Office of Special Counsel Patrick Fitzgerald has served two subpoenas on Ms. Miller: one requesting her testimony before the grand jury regarding confidential conversations she had with a specified administration official and the other asking her to produce specific documents relating to those conversations. Government's Response to Motion to Quash Grand Jury Subpoenas ("Gov't Opp'n") at 3. As was the case with the subpoenas issued upon Mr. Cooper and Mr. Russert addressed in the Court's July 20, 2004 Opinion, the specific subject matter Special Counsel will address before the grand jury is quite circumscribed, but it does delve into alleged conversations each reporter had with a confidential source.

Ms. Miller objects to the subpoenas using the same legal arguments that were raised by Mr. Cooper and Mr. Russert and which the Court ruled upon in its July 20, 2004 Memorandum Opinion. That ruling is incorporated by reference to this case. The Court issues this Opinion, however, to address one new argument that Ms. Miller included in her Motion to Quash and asserted at the motions hearing held on September 3, 2004.

Before addressing that argument, the Court will first note that as was the case with Mr. Cooper and Mr. Russert, Mr. Fitzgerald submitted an *ex parte* affidavit filed under seal in this matter. Gov't Opp'n at 1. As previously held in the July

20, 2004 Opinion, this Court is not convinced that the DOJ guidelines vest any right in the movant in this case. Assuming, *arguendo,* that the DOJ guidelines did vest a right in Ms. Miller, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald. Furthermore, assuming *arguendo* that this Court were to determine that Ms. Miller did possess a qualified privilege – a holding which the Court rejected in its July 20, 2004 Opinion – the *ex parte* affidavit has also established that Special Counsel would be able to meet even the most stringent of balancing tests. The information requested from Ms. Miller is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt.

Analysis

The Court addresses here an argument offered by Ms. Miller and further supported in the brief in support of the motion to quash submitted by eighteen major news organizations and reporters' groups appearing as amici curiae in this case. Ms. Miller points to Federal Rule of Evidence 501 and the Supreme Court's ruling in *Jaffee v. Redmond,* 518 U.S. 1 (1996), for the proposition that this Court may recognize a reporters privilege based in federal common law despite its holding that *Branzburg v. Hayes,* 408 U.S. 665 (1972), establishes that there is no First Amendment or common law privilege exempting the press from testifying before a grand jury acting in good faith. Motion of Judith Miller to Quash Subpoenas and/or for Protective Order ("Miller Mot.") at 19-21.

Federal Rule of Evidence 501, enacted in 1975, states that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and ex-

perience." Fed.R.Evid. 501. By enacting Rule 501, Congress gave federal courts the authority to "continue the evolutionary development of testimonial privileges." *Trammel v. United States,* 445 U.S. 40, 47 (1980). Rule 501 provides "the courts with the flexibility to develop rules of privilege on a case-by-case basis" and" leave[s] the door open to change." *Id.* In *Jaffee v. Redmond,* the Supreme Court articulated the analysis courts should undertake when determining whether to recognize a common law privilege under Rule 501. 518 U.S. 1 (1996).

The *Jaffee* Court explained that when determining whether a privilege should be recognized, a court should begin with the fundamental maxim that the public "has a right to every man's evidence." 518 U.S. at 9. "Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* (internal citations omitted). Accordingly, a privilege can and should be recognized under Rule 501 if that privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 9-10. This Court acknowledges that common law testimonial privileges may be created by courts under Rule 501 and the Supreme Court's opinion in *Jaffee.*

The issue before the Court is whether it should recognize a reporters privilege under Rule 501 and *Jaffee.* Ms. Miller argues that the Court should recognize such a privilege. In arguing that because the Court *can* recognize a common law privilege it therefore *should* recognize a reporters privilege in

this case, Ms. Miller tries to jump a chasm in two leaps.[1] Although *Branzburg* was decided three years prior to the adoption of Rule 501, the *Branzburg* Court already undertook the analysis of whether the public benefit at issue "outweigh[ed] the need for probative evidence" required under *Jaffee*. *Jaffee* 518 U.S. at 9-10.

In *Branzburg*, the Court made clear what issue was before it stating, "The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 681. As previously explained in the July 20, 2004 Opinion, the *Branzburg* Court concluded that the public's interest in fighting crime outweighed any burden on news gathering that would result from requiring reporters to testify before a grand jury. As the *Branzburg* Court explained:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process . . . we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

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1 *Cf.* "The most dangerous strategy is to jump a chasm in two leaps." Benjamin Disraeli, British politician (1804-1881).

Id. at 690-91.

Ms. Miller's argument that this Court should establish a common law privilege despite the balancing test already undertaken by the Supreme Court in *Branzburg* is even less convincing in light of what precisely the *Branzburg* Court was balancing. In *Branzburg*, the Court weighed an asserted First Amendment-based protection of the press against the need for probative evidence in grand juries in order to protect society from crime. To say it differently, the Court pitted a Constitutionally-based freedom of the press against society's need to fight crime, and concluded that the need to protect society from crime was more important than the burden on news gathering. Here, Ms. Miller asks the Court to repeat the same balancing test, but instead of supporting her argument with the weighty claim of First Amendment protection, she bases it on a privilege allegedly created through case law and Rule 501. The arguments in favor of protection of the press are weaker in this context, yet Ms. Miller asks this Court to come to the opposite conclusion of the Supreme Court in *Branzburg*. This Court declines to do so.

This Court holds that Ms. Miller has no privilege, based in the First Amendment or common law, qualified or otherwise, excusing her from testifying before the grand jury in this matter. Therefore, under the holding in *Branzburg* and its progeny, Ms. Miller must fulfill her obligation, shared by all citizens, to answer a valid subpoena issued to her by a grand jury acting in good faith. An appropriate order will accompany this opinion.

Sept. 9, 2004

/s/

Thomas F. Hogan

Chief Judge

ORDER

Pending before the Court is "Motion of Judith Miller to Quash Grand Jury Subpoenas and/or for Protective Order." For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion is **DENIED**. It is further

ORDERED that the parties are to submit to the Court no later than Wednesday, September 15, 2004 a motion stating any and all elements of the accompanying Memorandum Opinion dated September 9, 2004 that they believe should be redacted before the Memorandum Opinion is made public and published. The motion shall explain the reasons the parties believe the identified portions should be redacted. The parties may submit a joint or individual motions for redactions. If the parties believe that no redactions are necessary, they shall notify the Court of this is writing no later than Wednesday, September 15, 2004.

SO ORDERED.

Sept. 9, 2004

/s/

Thomas F. Hogan

Chief Judge

ORDER

It is hereby

ORDERED that this Court's Order and Memorandum Opinion dated September 9, 2004 shall be unsealed.

SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Special Counsel Investigation	:	Misc. Nos. 04-296 (TFH) 04-379 (TFH)

ORDER

Pending before the Court is the Motion of the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, to hold witnesses Matthew Cooper and Time Inc. in civil contempt of court pursuant to 28 U.S.C. § 1826. After conducting a hearing on October 13, 2004 and being fully advised, this Court finds as follows:

1. Matthew Cooper, having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied the motion to quash for the reasons stated in open court on October 7, 2004.

2. Matthew Cooper, in person and through counsel, has refused to comply with the grand jury subpoena without just cause.

3. Based on this refusal, Matthew Cooper is in civil contempt of this Court.

4. Time Inc., having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied

the motion to quash for the reasons stated in open court on October 7, 2004.

5. Time Inc., through counsel, has refused to comply with the grand jury subpoena without just cause.

6. Based on this refusal, Time Inc. is in civil contempt of this Court.

7. Matthew Cooper and Time Inc. have indicated their intention to pursue appeals to the United States Court of Appeals for the District of Columbia Circuit of this Court's orders finding them in contempt. These appeals are brought in good faith and raise substantial issues of law.

8. Matthew Cooper and Time, Inc. have agreed to file notices of appeal on or before October 15, 2004, and to move to consolidate these appeals with the appeal of this Court's order of October 7, 2004 finding Judith Miller in contempt of court. The parties have agreed to an expedited briefing schedule in the Court of Appeals requiring the filing of appellants' brief on October 22, 2004, the tiling of appellee's brief on November 3, 2004, and the filing of appellants' reply on November 10, 2004.

Based on the foregoing findings of fact, and for the reasons stated in open court, it is hereby

ORDERED that:

1. Matthew Cooper is ordered confined at a suitable place until such time as he is willing to comply with the grand jury subpoena. The period of confinement shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months.

2. Matthew Cooper is granted bail pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

3. Time Inc. is ordered to pay a fine of $1,000 per day until such time as it is willing to comp]y with the grand jury subpoena.

4. The Court's order requiring the payment of a fine by Time Inc. is stayed pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

SO ORDERED.

October 13, 2004

/s/

The Honorable Thomas F. Hogan

United States District Judge

APPENDIX F

United States District Court,

District of Columbia.

In re: SPECIAL COUNSEL INVESTIGATION

Nos. MISC.04-460(TJH), MISC.04-461(TFH).

Nov. 10, 2004.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

Pending before the Court is the Motion of Matthew Cooper and Time Inc. to Quash Subpoena and/or for Protective Order. The subpoenas in question were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of alleged CIA official Valerie Plame. For the reasons set forth in this Court's July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297, this Court's September 9, 2004 Memorandum Opinion in the case Misc. No. 04-407, and the additional reasons stated below, the Court denies the motion to quash.

Background

The facts surrounding this case and Mr. Cooper's role in it are outlined in the Court's Memorandum Opinion of July 20, 2004. Developments in the investigation subsequent to that Opinion are the impetus behind the current motion to quash. After Mr. Cooper failed to comply with the Court's July 20, 2004 Order, Special Counsel moved for an Order to Show Cause why Mr. Cooper should not be held in contempt of court. The same day, Special Counsel served a subpoena on Time requesting production of notes, tape recordings, e-mails or other documents of Cooper's relating to articles he had contributed to or written. Motion of Matthew Cooper and Time Inc. to Quash Subpoena and/or for Protective Order ("Mot. to Quash") at 4. Time filed a motion to quash the subpoena. On August 6, 2004, the Court denied Time's motion to quash referring to its Opinion of July 20, 2004. Time did not follow the Court's Order instructing it to comply with the subpoena. On August 9, 2004, the Court held Mr. Cooper and Time in contempt of court for refusing to comply with its rulings regarding the subpoenas.

Shortly thereafter, Cooper agreed to sit for deposition and Time agreed to produce certain documents. That deposition took place on August 23, 2004. Mot. to Quash at 4. At Cooper's deposition, Special Counsel explicitly reserved the right to seek additional testimony from Cooper if the need arose. Government's Response to Motion to Quash Grand Jury Subpoenas ("Gov't Response") at 3. After Cooper's deposition and Time's production of certain documents, Special Counsel made a motion to vacate the findings of contempt against Cooper and Time, which the Court granted.

On September 13, 2004, Special Counsel issued a second set of subpoenas upon Mr. Cooper and Time. These subpoenas requested testimony and documents from Mr. Cooper and documents from Time regarding conversations between Cooper and official sources prior to July 14, 2003

regarding former Ambassador Joseph Wilson, his 2002 trip to Niger, his wife Valerie Plame, and/or any affiliation between his wife Valerie Plame and the CIA. Mot. to Quash at 6. Cooper and Time currently move to quash those subpoenas based, in part, on arguments already rejected by this Court in its July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297 and the September 9, 2004 Memorandum Opinion in the case Misc. No. 04-407. The Court incorporates the rulings in those Opinions to this case by reference. Cooper and Time raise the additional argument that the second set of subpoenas should be quashed because they are unreasonable and/or oppressive under Federal Rule of Criminal Procedure 17(c)(2). In addition to the papers filed in opposition to the motion to quash, Mr. Fitzgerald has submitted an *ex parte* affidavit filed under seal.

Analysis

Rule 17(c)(2) states that a court "may quash or modify the subpoena if compliance would be unreasonable or oppressive." Federal Rule of Criminal Procedure 17(c)(2). Cooper and Time argue that because the second set of subpoenas seek the same information requested in the original subpoenas, enforcing these new subpoenas would be unreasonable and/or oppressive. Specifically, Movants take issue with the fact that Special Counsel voluntarily limited the previous subpoenas to information concerning one identified government official, yet he now looks to gather information that he previously agreed not to seek. Such an action, Cooper and Time argue, is unreasonable and oppressive. This Court disagrees.

In his *ex parte* affidavit, Special Counsel outlines in great detail the developments in this case and the investigation as a whole. The *ex parte* affidavit establishes that the government's focus has shifted as it has acquired additional information during the course of the investigation. Special Counsel now needs to pursue different avenues in order to

complete its investigation. Through the *ex parte* affidavit, the Court has determined that the subpoenas were not issued in an attempt to harass the movants, but rather stem from legitimate needs due to an unanticipated shift in the grand jury's investigation. The subpoenas bear directly on the grand jury investigation and are of a limited time and scope.

The fact that Mr. Cooper will now be subject to two depositions, as opposed to being asked all relevant questions during the first deposition, is not indicative of unreasonable or oppressive government action. Rather, this Court believes the second round of subpoenas demonstrates quite the opposite. The fact that Special Counsel did not exhaust all relevant subject matter during Mr. Cooper's first deposition shows that Mr. Fitzgerald was proceeding in the investigation with great deference to Cooper's status as a member of the press. The Court agrees with the government when it states, "To hold that the Special Counsel waived his right to seek additional testimony by proceeding in a step-by-step fashion would create a perverse incentive for prosecutors *not* to issue narrowly tailored subpoenas to reporters." Gov't Response at 8. Furthermore, at the end of Mr. Cooper's deposition, Special Counsel specifically reserved the right to seek additional testimony if the need arose.

The Court concludes that Special Counsel has in no way violated Rule 17(c)(2), and therefore, the additional subpoenas served upon Mr. Cooper and Time shall not be quashed on those grounds. As explained in depth in previous opinions, this Court holds that Mr. Cooper and Time have no privilege based in the First Amendment or common law, qualified or otherwise, excusing them from providing documents to or testifying before the grand jury in this matter. Therefore, Mr. Cooper and Time must fulfill their obligations to answer valid subpoenas issued to them by a grand jury acting in good faith. An appropriate order will accompany this opinion.

ORDER

Pending before the Court is the Motion of Matthew Cooper and Time Inc. to Quash Subpoena and/or for Protective Order. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion is **DENIED**.

SO ORDERED.

APPENDIX G

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 19, 2005

No. 04-3138

In re: Grand Jury Subpoena, Judith Miller

Consolidated with 04-3139, 04-3140

Appeals from the United States District Court
for the District of Columbia
(Nos. 04mc00407, 04mc00460, (No. 04mc00461)

On Appellants' Petition for Rehearing En Banc

Before: GINSBURG, *Chief Judge*; and EDWARDS. SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL,* GARLAND,** and ROBERTS,** *Circuit Judges*

ORDER

Appellants' petition for rehearing en banc, the response thereto, and the brief of amici curiae in support of appellants have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the

petition. Upon consideration of the foregoing and the emergency motion for expedited consideration of the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc be denied. It is

FURTHER ORDERED that the emergency motion for expedited consideration of the petition for rehearing en banc be dismissed as moot.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Deputy Clerk

* A separate statement of *Circuit Judge* TATEL concurring in the denial of the rehearing en banc is attached.

** *Circuit Judges* GARLAND and ROBERTS did not participate in this matter.

TATEL, *Circuit Judge*, concurring in the denial of rehearing en banc: Although en banc review is "not favored," Fed. R. App. P. 35(a), and although all three panel members agreed on the result in this case—i.e., that two subpoenaed reporters can be compelled to give grand jury testimony—petitioners seek reconsideration of three issues: their assertion of a common law privilege under Federal Rule of Evidence 501; their claim to First Amendment protection; and their due process challenge to the district court's use of ex parte evidence.

Regarding the common law issue, while I believe that "reason and experience," Fed. R. Evid. 501, support a qualified privilege for reporters' confidential sources, *see In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 989 (D.C. Cir. 2005) (Tatel, J., concurring), I concur in the court's denial of en banc review. Judge Henderson's opinion—which, as the narrowest supporting the result, is the controlling decision of the court—determined neither whether any common law privilege exists nor what standard would govern its application if it did. *See id.* at 981-82 (Henderson, J., concurring); *see also id.* at 976-77 (Sentelle, J., concurring); *id.* at 989-91 (Tatel, J., concurring). Hence, future panels of this court remain free to recognize any privilege (or no privilege) consistent with the result in this case, and those panels may, as necessary, clarify the standards governing reporter-source relationships. Given that the panel here agreed unanimously on the result, this particular case presents no question of "exceptional importance" in the sense required by our rule on en banc review. Fed. R. App. P. 35(a)(2).

En banc review is likewise unnecessary with respect to the First Amendment issue. True, this court's decisions interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972), are somewhat conflicted. For example, we have stated in civil litigation that "[c]ompelling a reporter to disclose the identity

of a confidential source raises obvious First Amendment problems," *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981), while maintaining with respect to grand juries that "[a] newsman can claim no general immunity, qualified or otherwise," unless "questions are put in bad faith for the purpose of harassment," *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977). But factual similarities between this case and *Branzburg* prevent this court from recognizing a First Amendment privilege here. *See In re Grand Jury Subpoena*, 397 F.3d at 988 (Tatel, J., concurring). Only the Supreme Court can limit or distinguish *Branzburg* on these facts.

Finally, petitioners offer no compelling reason to reconsider the panel's ruling on the due process issue. Claiming a right to review evidence used to find them in contempt, petitioners object to the district court's and panel's reliance on ex parte submissions to determine that any conceivable privilege was overcome. But barring an absolute privilege—something no federal common law decision endorses and that *Branzburg* forecloses as a First Amendment matter—reporters either enjoy no privilege, in which case compelling their testimony requires no evidence at all, or they hold a qualified privilege, that is, a privilege subject to exceptions, much like the crime-fraud exception to the attorney-client privilege, *see, e.g.*, *United States v. Zolin*, 491 U.S. 554, 563 (1989), and the imminent-harm exception for psychotherapist-patient communications, *see Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996). If the privilege is qualified, then ex parte review, far from violating due process, affords a critical protection to journalists: it permits the court to demand a detailed showing by the government that it has satisfied the criteria for overcoming the privilege.

I certainly understand petitioners' preference for reviewing the evidence themselves, but given the "'indispensable secrecy of grand jury proceedings,'" *United*

States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991) (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)), it can hardly represent an abuse of discretion for the district court to deny them that option. Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth. *See generally In re Grand Jury Subpoena*, 397 F.3d at 973-74 (discussing reasons for grand jury secrecy). Accordingly, we have approved of ex parte review in applying the crime-fraud exception to the attorney-client privilege—a context precisely analogous to application of a qualified reporter privilege. *See id.* at 1002 (Tatel, J., concurring) (citing *In re Sealed Case No. 983077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam)).

Attempting to manufacture a circuit conflict on this issue, petitioners cite language in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), and *In the Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983), contemplating an "uninhibited adversary hearing" in civil contempt proceedings. *See Alter*, 482 F.2d at 1024; *Kitchen*, 706 F.2d at 1272. Yet neither case remotely resembles this one. *Alter* dealt with alleged illegal surveillance of discussions between a grand jury witness and his attorney, a matter requiring no review of secret grand jury materials, *see* 482 F.2d at 1024-25, and *Kitchen* involved contempt findings based on the alleged implausibility of a witness's claimed failure of memory—a situation more akin to punishment for perjury than evaluation of a privilege claim, *see Kitchen*, 706 F.2d at 1272 (identifying a need for "heightened" procedural protection "[w]hen a case is in the grey area between contempt and perjury"). Nor do petitioners' other authorities involve

compulsion of testimony due to failure of an asserted privilege. While expressing caution regarding use of secret evidence, they deal, respectively, with retraction of security clearance, punishment for false testimony, and denial of visas. *See Greene v. McElroy*, 360 U.S. 474 (1959); *In re Oliver*, 333 U.S. 257 (1948); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987). Unlike in those cases, the disputed evidence here relates to the government's conduct of its investigation, not the witness's own conduct. Moreover, again unlike in those cases, the reporters here face only a coercive penalty, not punishment for past actions. To avoid incarceration, they need not persuade the district judge that any accusation against them is false; they need only abandon their unlawful resistence and testify before the grand jury. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994).

The better analogy is *R. Enterprises*, where the Supreme Court approved of ex parte proceedings to determine the reasonableness of grand jury subpoenas. Although denial of a reasonableness-based motion to quash may expose witnesses to coercive measures (including incarceration) no less than denial of a claimed privilege, the Court observed that "to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." *R. Enterprises*, 498 U.S. at 302; *cf. Abourezk*, 785 F.2d at 1061 (describing in camera review of subpoenaed evidence "for the limited purpose of determining whether the asserted privilege is genuinely applicable" as a "notabl[e]" exception to the rule against secret evidence).

In short, because none of petitioners' claims meets our high standard for reconsideration by the en banc court, I join in denying their petition.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TO BE FILED UNDER SEAL

In re SPECIAL COUNSEL INVESTIGATION,	:	
In re GRAND JURY SUBPOENA OF MATTHEW COOPER	:	Case No. Misc. ____ (TFH)
	:	

AFFIDAVIT OF MATTHEW COOPER

DISTRICT OF COLUMBIA: ss.:

MATTHEW COOPER, being first duly sworn, deposes and says:

1. I am a White House Correspondent for *Time* magazine, which is published by Time Inc. ("Time"). I have worked for *Time* magazine as a reporter for almost five years and have been a professional journalist for approximately 20 years. I submit this affidavit in support of the motion to quash a subpoena directed at me.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. I have spent my career working as an investigative journalist on a wide variety of issues, including White House and Beltway coverage. In addition to writing for *Time* magazine, I have written for *U.S. News & World Report*, *The New Republic*, *Newsweek*, *The New York Times*, *The Washington Post*, *Slate*, *George*, *The Washington Monthly*, and *Los Angeles* magazine.

4. On July 17, 2003, Time.com published an article co-authored by me entitled "A War on Wilson?". The July 17 article described Ambassador Joseph Wilson's July 6, 2003 op-ed piece in *The New York Times* criticizing the Bush Administration's claims it used to bolster its case to go to war with Iraq, as well as the Administration's reaction to the piece. The article also reported that "government officials" had noted to *Time* in interviews (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, was "a CIA official," and that these same government officials suggested that Ms. Plame was involved in promoting Ambassador Wilson's trip to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore, known as "yellowcake." The July 17 article also discussed the details of Ambassador Wilson's CIA report about his investigations in Niger, and the Administration's reaction to the information contained in that report. Attached hereto as Exhibit A is a copy of the July 17, 2003 article.

5. Prior to the publication of the July 17 article, Mr. Novak had published a July 14, 2003 article in the *Chicago Sun Times,* entitled "Mission to Niger," in which he disclosed that Wilson's wife, Valerie Plame, was a "CIA operative on weapons of mass destruction." Mr. Novak's widely syndicated article stated that "two senior administration officials told [Novak] Wilson's wife suggested sending him to Niger . . . ." I had no involvement whatsoever with Mr. Novak's July 14 article.

6. My July 17, 2003 article was written with the help of confidential sources with whom I had contact. The "government officials" I made reference to in that article provided me with information for that article on the condition that their identities not be disclosed. I would not have been able to gather and report that information and other information in the July 17 article had I not promised my sources confidentiality.

7. On July 21, 2003, *Time* magazine published an article written by Michael Duffy and James Carney entitled "A Question of Trust." Because of publication deadlines and the way *Time* dates its articles for newsstand publication, that article first appeared on Sunday, July 13. I was one of six reporters who, in addition to Messrs. Duffy and Carney, contributed some reporting to the article. The July 21 article reported on the flawed information used in President Bush's January 28, 2003 State of the Union Address — specifically, the President's discussion of Iraq's purported attempt to procure large quantities of uranium ore from Niger. Administration officials themselves claimed that the information should not have been in the Address. The July 21 article also traced the roots of the inaccurate information from evidence obtained by the Italian government that Iraq had been attempting to purchase uranium ore from Niger, to Ambassador Wilson's 2002 investigative mission to Niger to investigate these claims, to various discussions among Administration officials about support for the theory. This article did not discuss Ms. Plame or her identity as a CIA officer. Attached hereto as Exhibit B is a copy of the July 21, 2003 article.

8. Like the July 17, 2003 article that I authored, the July 21, 2003 article was based, in part, upon information gathered from confidential sources. None of that information related to Ms. Plame or her role in the CIA.

9. I have been informed that the Department of Justice has undertaken a criminal investigation in order to identify

the source or sources who leaked Valerie Plame's identity and her association with the CIA.

10. On May 21, 2004 I received a subpoena seeking my testimony before a grand jury, and the production of documents, relating to my reporting of the articles for Time.com and *Time* magazine. A copy of the subpoena is attached hereto as Exhibit C.

11. I have reviewed the subpoena and have conferred with my counsel. I have been informed that the Special Counsel expects to ask me questions seeking to lead me to set forth in detail a discussion or discussions I may have had with an individual in the Administration which would, by its nature, reveal whether that person was or was not a confidential source for my July 17 article. My review of the written materials sought by the subpoena that are in my custody or control reveals that the identities of confidential sources are also set forth in those documents.

12. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about or otherwise reveal the identity of their confidential sources, or about their conversations with their sources, would seriously limit the ability of journalists to gather and report the news. Many of the stories I have written have been based on confidential source information. I have reported extensively for *Time's* four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House. This month, I revealed to *Time's* readers and the public, in a story that gained wide notice, that President Bush displays Saddam Hussein's personal pistol as a trophy in the White House. I would not have been able to report on any of these matters — or on countless other newsworthy stories — without being able to promise confidentiality to my sources.

13. Often, promises of confidentiality are the only means of obtaining important information of public concern. Some

of the most important journalism in American history has depended on confidential sources, such as the figure identified as "Deep Throat" during the Watergate period. Without confidential sources, it would be virtually impossible to effectively investigate and report on current government issues, including government scandals. This would deprive the public of critical information.

14. Compelling journalists to testify about their conversations with confidential sources would impede the free flow of information and compromise reporters' independence and integrity. Future attempts to obtain cooperation from those or other confidential sources would be frustrated because sources would have the impression that journalists either are or can readily be converted into investigative arms of the government. Whistleblowers or confidential sources would be strongly deterred from coming forward if they knew that courts could compromise their identity by allowing prosecutors to issue subpoenas.

15. I could not effectively report on matters of concern to the public — war, peace, the budget — without using confidential sources; nor could any of my colleagues at *Time* magazine. Many newsworthy stories come to me from people — some connected with the Administration, some not — who make clear to me that they will not offer information to me unless I can promise them that their identities will remain secret. This is widely understood to be the case not just for myself but for journalists at all major publications. While I seek to attribute on a public basis quotations and other information to their sources whenever it is possible to do so, in some circumstances sources provide me with significant information only on the condition that I not disclose the source's identity. In such instances, I agree that I will not reveal the identity of the source. By promising confidentiality to such sources, I am able to report on many things that would otherwise go unreported.

16. If potential sources were to perceive me as being untrustworthy or as a reporter who is willing to break promises of confidentiality, they would likely refuse to speak to me or to provide me with important stories that I would otherwise be able to report to the public. This breach of contract would have a profoundly negative effect upon my work and the extent of my reporting, and that of my colleagues — not only at *Time* magazine, America's largest news-weekly, but at Time's many other publications and at all other news publications. If courts compel such testimony, it is hard to see why any confidential source would speak to any journalist.

17. In addition, compelling journalists to testify about their conversations with confidential sources would make journalists' promises to such sources meaningless. I take my promises and commitments seriously. If I were to inform the Government about my conversations with confidential sources or turn over documents that would reveal their identities, I would be violating my promises to those sources and the confidences placed in me by them. I take those promises very seriously and fully intend to honor them.

18. Finally, I understand that the person that the Special Counsel wishes to ask me about has signed some sort of widely-circulated form, drafted and presented to him by the Department of Justice, asking any journalist he has spoken with to cooperate with the government's investigation and not to assert any journalistic privilege. Without commenting one way or the other about whether the individual identified is a confidential source of mine (indeed, I would take the same position with regard to any potential confidential source that the government sought to compel me to answer questions about), I do not find at all persuasive the argument that any privilege I have not to testify about potential confidential sources is "waived" as a result of this signed form. Whatever may have been said publicly or privately within the government to any source of mine that may have cajoled him or her

to sign the form prepared by the government -- and I have read public statements of the President himself urging all officials to cooperate with the investigation — does not affect my promise of confidentiality to my sources in any way. I have seen and heard nothing that would relieve me of my obligation to keep the identity of any confidential source or sources secret. I do not feel at all confident that such a form, presented to individuals by their employer (or here the Attorney General and tacitly even the President himself) is not signed under extraordinary pressure. Based on two decades as a reporter, I strongly believe that if the courts enforced use of such forms, it would deter confidential sources from coming forward and would set a dangerous precedent.

19. I respectfully urge the Court to quash the subpoena in its entirety.

/s/
Matthew Cooper

Sworn to before me this
3rd day of June, 2004

/s/
Notary Public

Barbara Brincefield
Notary Public District of Columbia
My Commission Expires October 14, 2005

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TO BE FILED UNDER SEAL

In re SPECIAL COUNSEL INVESTIGATION,	:	Case Nos.
In re GRAND JURY SUBPOENA TO MATTHEW COOPER	:	Misc. ____ (TFH) and Misc.
In re GRAND JURY SUBPOENA TO TIME INC.	:	____ (TFH
	:	

AFFIDAVIT OF MATTHEW COOPER

DISTRICT OF COLUMBIA: ss.:

MATTHEW COOPER, being first duly sworn, deposes and says:

1. I am a White House Correspondent for *Time* magazine, which is published by Time Inc. ("Time"). I have worked for *Time* magazine as a reporter for more than five years and have been a professional journalist for approximately 20 years. I submit this affidavit in support of the motion to quash a subpoena directed at me.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. I have spent my career working as an investigative journalist on a wide variety of issues, including White House and Beltway coverage. In addition to writing for *Time* magazine, I have written for *U.S. News & World Report*, *The New Republic*, *Newsweek*, *The New York Times*, *The Washington Post*, *Slate*, *George*, *The Washington Monthly*, and *Los Angeles* magazine.

4. On July 17, 2003, Time.com published an article co-authored by me entitled "A War on Wilson?". The July 17 article described Ambassador Joseph Wilson's July 6, 2003 op-ed piece in *The New York Times* criticizing the Bush Administration's claims it used to bolster its case to go to war with Iraq, as well as the Administration's reaction to the piece. The article also reported that "government officials" had noted to *Time* in interviews (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, was "a CIA official," and that these same government officials suggested that Ms. Plame was involved in promoting Ambassador Wilson's trip to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore, known as "yellowcake." The July 17 article also discussed the details of Ambassador Wilson's CIA report about his investigations in Niger, and the Administration's reaction to the information contained in that report. Attached hereto as Exhibit 1 is a copy of the July 17, 2003 article.

5. Prior to the publication of the July 17 article, Mr. Novak had published a July 14, 2003 article in the *Chicago Sun Times,* entitled "Mission to Niger," in which he disclosed that Wilson's wife, Valerie Plame, was a "CIA operative on weapons of mass destruction." Mr. Novak's widely syndicated article stated that "two senior administration officials told [Novak] Wilson's wife suggested sending him to Niger . . . . I had no involvement whatsoever with Mr. Novak's July 14 article.

6. My July 17, 2003 article was written with the help of confidential sources with whom I had contact The "government officials" I made reference to in that article provided me with information for that article on the condition that their identities not be disclosed. I would not have been able to gather and report that information and other information in the July 17 article had I not promised my sources confidentiality.

7. On July 21, 2003, *Time* magazine published an article written by Michael Duffy and James Carney entitled "A Question of Trust." Because of publication deadlines and the way *Time* dates its articles for newsstand publication, that article first appeared on Sunday, July 13. I was one of six reporters who, in addition to Messrs. Duffy and Carney, contributed some reporting to the article. The July 21 article reported on the flawed information used in President Bush's January 28, 2003 State of the Union Address — specifically, the President's discussion of Iraq's purported attempt to procure large quantities of uranium ore from Niger. Administration officials themselves claimed that the information should not have been in the Address. The July 21 article also traced the roots of the inaccurate information from evidence obtained by the Italian government that Iraq had been attempting to purchase uranium ore from Niger, to Ambassador Wilson's 2002 investigative mission to Niger to investigate these claims, to various discussions among Administration officials about support for the theory. This article did not discuss Ms. Plame or her identity as a CIA officer. Attached hereto as Exhibit 2 is a copy of the July 21, 2003 article.

8. Like the July 17, 2003 article that I authored, the July 21, 2003 article was based, in part, upon information gathered from confidential sources. None of that information related to Ms. Plame or her role in the CIA.

9. I have been informed that the Department of Justice has undertaken a criminal investigation in order to identify

the source or sources who leaked Valerie Plame's identity and her association with the CIA.

10. To date, I have received two subpoenas in connection with this investigation. On May 21, 2004 I received a subpoena seeking my testimony before a grand jury, and the production of documents, relating to my reporting of the July 17 and July 21, 2003 articles for Time.com and *Time* magazine. A copy of the May 21, 2004 subpoena is attached hereto as Exhibit 3.

11. My employer, Time Inc., was served with a related subpoena on August 2, 2004 seeking documents relating to my reporting of the July 17 and July 21, 2003 articles for Time.com and *Time* magazine. A copy of the August 2, 2004 subpoena of Time Inc. is attached hereto as Exhibit 4.

12. In connection with the May 21, 2004 subpoena directed at me, the Special Counsel informed me that he intended only to ask me questions concerning a discussion or discussions I may have had with an individual in the Administration who was identified by the Special Counsel, even though the scope of the subpoena was broader than that.

13. On June 4, 2004, I moved to quash the subpoena and submitted an affidavit in support of that motion. Following this Court's denial of the motion to quash, I respectfully declined to comply with the subpoena, thus permitting me to appeal the Court's Order. I was subsequently held in civil contempt and ordered imprisoned by this Court on August 9, 2004.

14. Time Inc. similarly moved to quash the subpoena directed at its documents. Following this Court's denial of Time Inc.'s motion to quash, Time Inc. respectfully declined to comply with the subpoena so that it could appeal the Court's Order. On August 9, 2004, Time Inc. was subsequently held in civil contempt and ordered by this Court to pay a $1000/day fine.

15. Soon thereafter, Time Inc. and I both filed notices of appeal with the Court of Appeals.

16. Following the entry of my notice of appeal, I reached an agreement with the Special Counsel whereby I agreed to sit for a deposition and answer all questions posed by the Special Counsel related to the particular individual previously identified by the Special Counsel as the subject of the subpoena. I chose to sit for the deposition and answer the questions on this limited topic. I did so only after receiving assurance from the identified individual that the identified individual did not object to my doing so.

17. On August 23, 2004, I was deposed and fully and truthfully answered all questions posed to me by the Special Counsel on the topics specifically identified by the Special Counsel as the basis for the subpoena. I did so in a good faith effort to comply with the Special Counsel's investigation to the extent that I could while honoring promises of confidentiality I had made to my sources. As a result of my testimony, and as a result of a motion made by the Special Counsel, this Court vacated the civil contempt judgments against both Time Inc. and me.

18. At my deposition, the Special Counsel reserved the right to subpoena me again, if necessary. I was led to believe, however, that he would not do so without good reason.

19. My testimony about what one of my sources said to me can hardly have raised for the Special Counsel for the first time the possibility that my other sources had said things of potential interest to him. The July 17, 2003 article I had co-authored was *explicit* that *"some government officials"* had *"noted to Time in interviews"* that Ambassador Wilson's wife, Valerie Plame, was a CIA official who monitored the proliferation of weapons of mass destruction. *See* Exhibit I (emphasis added). Yet now the Special Counsel seeks to subpoena me again to respond to the very questions his initial

subpoenas sought testimony about and which the Special Counsel chose to drop from those subpoenas.

20. On September 13, 2004, only days after sitting for the August 23, 2004 deposition and being advised that this Court had vacated its finding that I was in civil contempt, I was served with a second subpoena seeking my testimony again and even more documents on a broader assortment of topics. Specifically, the subpoena sought testimony "reflecting conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame a/k/a Valerie Wilson a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." A copy of the September 13, 2004 subpoena is attached hereto as Exhibit 5. I understand that Time Inc. has been served with a second subpoena as well, seeking documents in its possession related to my reporting about these same matters.

21. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about or otherwise reveal the identity of their confidential sources, or about their conversations with their sources, would seriously limit the ability of journalists to gather and report the news. Many of the stories I have written have been based on confidential source information. I have reported extensively for *Time's* four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House. In June, I revealed to *Time's* readers and the public, in a story that gained wide notice, that President Bush displays Saddam Hussein's personal pistol as a trophy in the White House. I would not have been able to report on any of these matters — or on countless other newsworthy stories — without being able to promise confidentiality to my sources.

22. Often, promises of confidentiality are the only means of obtaining important information of public concern. Some of the most important journalism in American history has depended on confidential sources, such as the figure identified as "Deep Throat" during the Watergate period. Without confidential sources, it would be virtually impossible to effectively investigate and report on current government issues, including government scandals. This would deprive the public of critical information.

23. Compelling journalists to testify about their conversations with confidential sources would impede the free flow of information and compromise reporters' independence and integrity. Future attempts to obtain cooperation from those or other confidential sources would be frustrated because sources would have the impression that journalists either are or can readily be converted into investigative arms of the government. Whistleblowers or confidential sources would be strongly deterred from coming forward if they knew that courts could compromise their identity by allowing prosecutors to issue subpoenas.

24. I could not effectively report on matters of concern to the public — war, peace, the budget — without using confidential sources; nor could any of my colleagues at *Time* magazine. Many newsworthy stories come to me from people -- some connected with the Administration, some not — who make clear to me that they will not offer information to me unless I can promise them that their identities will remain secret. This is widely understood to be the case not just for myself but for journalists at all major publications. While I seek to attribute on a public basis quotations and other information to their sources whenever it is possible to do so, in some circumstances sources provide me with significant information only on the condition that I not disclose the source's identity. In such instances, I agree that I will not reveal the identity of the source. By promising confidential-

ity to such sources, I am able to report on many things that would otherwise go unreported.

25. If potential sources were to perceive me as being untrustworthy or as a reporter who is willing to break promises of confidentiality, they would likely refuse to speak to me or to provide me with important stories that I would otherwise be able to report to the public. This breach of contract would have a profoundly negative effect upon my work and the extent of my reporting, and that of my colleagues — not only at *Time* magazine, America's largest news-weekly, but at Time's many other publications and at all other news publications. If courts compel such testimony, it is hard to see why any confidential source would speak to any journalist.

26. In addition, compelling journalists to testify about their conversations with confidential sources would make journalists' promises to such sources meaningless. I take my promises and commitments seriously. If I were to inform the Government about my conversations with confidential sources or turn over documents that would reveal their identities, I would be violating my promises to those sources and the confidences placed in me by them. I take those promises very seriously and fully intend to honor them.

27. I respectfully urge the Court to quash the subpoena in its entirety.

/s/
Matthew Cooper

Sworn to before me this
21st day of September, 2004

/s/
Notary Public

Michelle Mackie
Notary Public, State of New York
No. 01MA6053274
Qualified in New York County
Commission Expires January 8, 2007

(5) (5)

SUPREME COURT, U.S.
FILED
MAY 31 2005
OFFICE OF THE CLERK

Nos. 04-1507 and 04-1508

In the Supreme Court of the United States

JUDITH MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

MATTHEW COOPER AND TIME INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, if there is a qualified reporter's privilege in the grand jury context, as the court of appeals assumed for purposes of resolving this case, the court of appeals properly found that the privilege was overcome on the facts of the case.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Air Courier Conference of Am. v. *Am. Postal Workers Union*, 498 U.S. 517 (1991)	13
Baker v. *F&F Inv.*, 470 F.2d 778 (2d Cir. 1972)	26
Bartnicki v. *Vopper*, 532 U.S. 514 (2001)	28
Branzburg v. *Hayes*, 408 U.S. 655 (1972)	5, 8, 22, 23, 24, 25, 26, 27
Cohen v. *Cowles Media Co.*, 501 U.S. 663 (1991)	22
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	19
Grand Jury Proceedings, In re, 5 F.3d 397 (9th Cir. 1993), cert. denied, 510 U.S. 1041 (1994)	26
Grand Jury Proceedings, In re, Storer Communications, 810 F.2d 580 (6th Cir. 1987)	26
Greene v. *McElroy*, 360 U.S. 474 (1959)	17
Hamdi v. *Rumsfeld*, 124 S. Ct. 2633 (2004)	18
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	14
International Union, UMWA v. *Bagwell*, 512 U.S. 821 (1994)	18
Jaffe v. *Redmond*, 518 U.S. 1 (1996)	13, 14
Kitchen, In re, 706 F.2d 1266 (2d Cir. 1983)	20, 21
Letellier, In re, 578 A.2d 722 (Me. 1990)	28
New York Times v. *Gonzales*, No. 04 Civ. 7677 (RWS) 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005)	21
Oliver, In re, 333 U.S. 257 (1948)	17
Petroleum Prods. Antitrust Litig., In re, 608 F.2d 5 (2d Cir.), cert. denied, 459 U.S. 909 (1982)	27

Cases—Continued: Page

Rutledge v. *United States*, 517 U.S. 292 (1996) 21
Saxbe v. *Washington Post*, 417 U.S. 843 (1974) 25
Sealed Case No. 98-3077, In re, 151 F.3d 1059 (D.C. Cir. 1998) 16, 17
Special Proceedings, In re, 373 F.3d 37 (1st Cir. 2004) 26
Tunis Bros. Co., Inc. v. *Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985) 21
Turner Broad. Sys. v. *FCC*, 512 U.S. 622 (1994) 28
United States v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) 20
United States v. *Dionisio*, 410 U.S. 1 (1973) 19
United States v. *Mara*, 410 U.S. 19 (1973) 19
United States v. *Procter & Gamble Co.*, 356 U.S. 677 (1958) 19
United States v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991) 18
University of Pa. v. *EEOC*, 493 U.S. 182 (1990) 22
Williams, In re, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992) 21, 26
Zerilli v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981) 13, 27
Zurcher v. *Standford Daily*, 436 U.S. 547 (1978) 25

Constitution, statute, regulation and rules:

U.S. Const. Amend. I ..... *passim*
D.C. Code § 16-4701 *et seq.* 15
28 C.F.R. 50.10 ..... 4, 10
Fed. R. Evid. 501 13
Sup. Ct. R. 10 ..... 11, 21

Miscellaneous: Page

Stephen Bates, *The Reporter's Privilege, Then and Now* (Research Paper R-23) (Apr. 2000) <http://www.ksg.harvard.edu/presspol/Research_Publications/Papers/Research_Papers/R23.pdf> 25

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Monica Langley & Lee Levine, *Broken Promises*, Col. Journalism Rev., July-Aug. 1998 25

In the Supreme Court of the United States

No. 04-1507

JUDITH MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 04-1508

MATTHEW COOPER AND TIME INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Miller Pet. App. 1a-77a; Cooper Pet. App. 1a-85a) is reported at 397 F.3d 964. The opinions of the district court denying petitioners' motions to quash (Miller Pet. App. 81a-86a, 87a-97a; Cooper Pet. App. 86a-97a, 101a-107a, 111a-115a) are reported at 332 F. Supp. 2d 26, 338 F. Supp. 2d 16, and 346 F. Supp. 2d 54. The orders of the district court holding petitioners in civil contempt (Miller Pet. App. 78a-79a; Cooper Pet. App. 108a-110a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. A petition for rehearing was denied on April 19, 2005 (Miller App. 98a-103a; Cooper Pet. App. 116a-122a). The petition for a writ of certiorari in No. 04-1507 was filed on May 9, 2005, and the petition for a writ of certiorari in No. 04-1508 was filed on May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the spring and summer of 2003, a controversy arose concerning a statement made by President George W. Bush during the State of the Union address delivered on January 28, 2003. Miller Pet. App. 3a. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." *Ibid.*

The accuracy of this statement, later colloquially referred to as the "16 words," was called into question by a series of articles, including an op-ed piece by Joseph C. Wilson IV, a retired career State Department official, which was published in the *New York Times* on July 6, 2003. Miller Pet. App. 3a, 183a-187a. In the op-ed piece, Wilson asserted that he had taken a trip to Niger in 2002 at the request of the Central Intelligence Agency (CIA) to investigate a report that Iraq had sought or obtained uranium from Niger, and that he had reported to the CIA upon his return his conclusion that it was "highly doubtful that any such transaction had ever taken place." *Id.* at 183a-184a. Wilson asserted that "some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat." *Id.* at 183a.

Eight days later, on July 14, 2003, syndicated columnist Robert Novak published a column in the *Chicago Sun-Times* in which he asserted that "two senior administration officials" told him that Wilson had been selected for the Niger trip at the suggestion of Wilson's wife, whom Novak described as a CIA "operative on weapons of mass destruction." Miller Pet. App. 188a-189a.

After Novak's column was published, it was reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband's being sent to Africa. Miller Pet. App. 4a. Among the articles that related this information was an article contributed to by Matthew Cooper and published by Time.com on July 17, 2003, and later in print. *Ibid.* The article stated that "some government officials have noted to Time in interviews * * * that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction * * * [and] have suggested that she was involved in her husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore." Matthew Cooper et al., *A War on Wilson?*, TIME.com (July 17, 2003), *available at* http://wwwtime.com/time/nation/article/0,8599,465270,00.html. In addition, on September 28, 2003, the *Washington Post* reported that, in the July 2003 time frame, "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Miller Pet. App. 4a.

2. In the fall of 2003, the government began an investigation into whether federal law had been violated in connection with the unauthorized disclosure by gov-

ernment employees of information concerning the identity of a purported CIA employee. Miller Pet. App. 4a. In late December 2003, the Attorney General recused himself from the investigation, and delegated his authority in connection with the investigation to Deputy Attorney General James B. Comey as Acting Attorney General. *Id.* at 4a, 192a-193a. Deputy Attorney General Comey, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel, and delegated full authority concerning the investigation to him. *Ibid.* The grand jury investigation began in January 2004. *Id.* at 4a.

During the period January through May 2004, the grand jury conducted an extensive investigation. Miller Pet. App. 5a. Beginning in May 2004, it was determined that it was necessary to obtain testimony and documents from a limited number of reporters, including Matthew Cooper of Time Inc. (Time), and Judith Miller of the New York Times, in connection with the investigation. Gov't C.A. Br. 3, 7-8, 10. In accordance with Department of Justice guidelines on the issuance of subpoenas to members of the news media, 28 C.F.R. 50.10, the Special Counsel first sought Cooper's and Miller's voluntary cooperation. However, the reporters refused to provide the requested information voluntarily. Gov't C.A. Br. 3.

3. a. On May 21, 2004, a grand jury subpoena was issued to Matthew Cooper seeking testimony and documents related to articles published on July 17, 2003 and July 21, 2003 to which he had contributed. Miller Pet. App. 5a. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel.

Ibid. On June 3, 2004, Cooper moved to quash the subpoena. *Ibid.* In response, the government argued that the law did not support the application of a reporter's privilege in the context of a good faith grand jury investigation and that, even if the court were to apply a qualified privilege, compliance with the subpoena would be required. Gov't C.A. Br. 4. Although the government took the position that it was not legally required to make any factual showing prior to demanding compliance with the subpoenas, in order to assure the district court that the subpoenas were appropriate, the government submitted, *ex parte* and under seal, detailed summaries of evidence gathered during the course of the investigation, with specific references to grand jury witness testimony, and materials identified as "classified." *Ibid.*

On July 6, 2004, the district court denied Cooper's motion and, on July 20, 2004, it issued a written opinion and order. Miller Pet. App. 87a.[1] In the July 20, 2004 opinion, the district court concluded that this Court, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), had rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith (Miller Pet. App. 90a), and that, even were the court to determine that the reporters did possess a qualified privilege, the Special Counsel's *ex parte* evidentiary submission "would be able to meet even the most stringent of balancing tests" (*id.* at 96a). In addition, the district court held that, while it was not convinced that the Department of Justice guidelines

[1] Cooper's motion was decided with a motion to quash filed by NBC correspondent Tim Russert. Miller Pet. App. 87a. Russert elected to comply with the subpoena directed to him after his motion to quash was denied.

"vested any right" in the reporters, the guidelines were "fully satisfied" by the facts presented by the Special Counsel. *Ibid.*

A subpoena was issued to Time for the same documents requested from Cooper. Miller Pet. App. 5a. Time moved to quash the subpoena, and its motion was denied on August 6, 2004. *Ibid.*

Despite the denial of their motions to quash, Cooper and Time refused to comply with the subpoenas. Miller Pet. App. 5a. On August 9, 2004, after a hearing, the district court found that Cooper and Time had refused to comply with the subpoenas without just cause, and held them in civil contempt of court. Cooper Pet. App. 98a.

After being held in contempt, and after filing notices of appeal, Cooper and Time agreed to comply with the subpoenas, as limited by the Special Counsel, with the Special Counsel explicitly reserving the right to seek additional testimony and documents from Cooper and Time, if necessary. Miller Pet. App. 5a. Cooper indicated that his rationale for agreeing to provide testimony and documents pursuant to this agreement was the fact that the source had stated that he had no objection. *Ibid.* After Cooper and Time fulfilled their obligations under the agreement, the district court's contempt order was vacated, and Cooper's and Time's notices of appeal were voluntarily dismissed. *Ibid.*

b. On September 13, 2004, the grand jury issued a second set of subpoenas to Cooper and Time seeking testimony and documents relating to "conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame a/k/a Valerie Wilson a/k/a Valerie Plame (the wife of former Ambas-

sador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." Miller Pet. App. 5a-6a.

Cooper and Time moved to quash these subpoenas and, on October 7, 2004, after briefing and a hearing, the district court denied their motions. Cooper Pet. App. 108a. In a memorandum opinion dated November 10, 2004, the district court relied on the grounds stated in the court's July 20, 2004 opinion, and on the additional ground that the new subpoenas "stem[med] from legitimate needs due to an unanticipated shift in the grand jury's investigation," were not issued in an attempt to harass, and thus were not unreasonable or oppressive. *Id.* at 111a-115a. On October 13, 2004, after a hearing, the district court held Cooper and Time in civil contempt of court based on their refusal to comply with the subpoenas. *Id.* at 108a-110a.

4. On August 12 and August 20, 2004, grand jury subpoenas were issued to reporter Judith Miller and the New York Times, seeking documents and testimony related to conversations between Miller and a specified government official occurring between on or about July 6, 2003 and on or about July 13, 2003, "concerning Valerie Plame Wilson," whether referred to by name or by description, "concerning Iraqi efforts to obtain uranium." Miller Pet. App. 115a-119a. Miller refused to comply with the subpoenas and, instead, moved to quash them on the same grounds previously asserted by Cooper and Time. *Id.* at 6a. The New York Times indicated that it was in possession of no documents responsive to the subpoena. Gov't C.A. Br. 10.

After briefing and a hearing, the district court denied Miller's motion to quash, on the grounds set forth in its July 20, 2004 opinion. Miller Pet. App. 80a-86a. Like Cooper and Time, Miller persisted in refusing to comply with the subpoenas, and the district court therefore

held her in civil contempt of court as well. *Id.* at 78a-79a.

5. Cooper, Time and Miller brought a consolidated appeal to the United States Court of Appeals for the District of Columbia Circuit. On February 15, 2005, a panel of the court of appeals affirmed the orders of the district court, with all three members of the panel voting to affirm. Miller Pet. App. 1a-77a.

The panel was unanimous in its rejection of petitioners' claimed First Amendment privilege in the grand jury context. In the opinion for the court authored by Judge Sentelle, the panel thoroughly analyzed *Branzburg* v. *Hayes*, *supra*, and, finding no material distinction between the facts of *Branzburg* and those of the case before the court of appeals, held that *Branzburg* foreclosed petitioners' claim of protection based on a reporter's privilege rooted in the First Amendment. Miller Pet. App. 7a-15a.

With respect to petitioners' request that the court recognize an absolute reporter's privilege rooted in federal common law, the panel was unanimous in ruling out the existence of such a privilege. Miller Pet. App. 15a, 76a-77a. With respect to petitioners' alternative argument for a qualified privilege, the panel was "not of one mind" concerning the existence of such a privilege. Miller Pet. App. 15a. The court explained that Judge Sentelle "would hold that there is no such common law privilege," that Judge Tatel "would hold that there is such a common law privilege," and that Judge Henderson "believes that we need not, and therefore should not, reach that question." *Ibid.*

The panel also unanimously agreed that, using the formulation of a qualified common law privilege suggested by Judge Tatel, the privilege was overcome and, therefore, that the district court's decision should be

affirmed. Miller Pet. App. 15a, 22a, 31a, 77a.[2] Judge Tatel, who alone favored recognition of a common law reporter's privilege, applied the standard he had formulated to the facts of the case and determined, after "carefully scrutiniz[ing] [the special counsel's] voluminous classified filings," that, "based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony," and that, "considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." Miller Pet. App. 64a, 75a.[3]

Finally, the panel unanimously rejected petitioners' claim that the district court had improperly considered the government's *ex parte* submissions of grand jury material, much of which was classified. Miller Pet. App. 18a. The court held that the procedure employed by the district court was necessary to protect grand jury secrecy, and was fully consistent with binding prece-

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[2] As "the controlling decision of the court," Judge Henderson's concurring opinion made clear that the Court had assumed, but not decided, that a qualified common law reporter's privilege exists and the "standard [that] would govern its application if it did." Miller Pet. App. 100a. Thus, future panels of the court were "free to recognize any privilege (or no privilege)." *Ibid.*

[3] Judge Tatel's opinion described in detail the facts that led him to conclude that the privilege had been overcome. Because that portion of his opinion refers to classified grand jury information from the *ex parte* submissions, it is redacted from the court's published opinion. It is our understanding that the redacted portion of Judge Tatel's opinion is available to this Court from the Deputy Marshal, through the Department of Justice Litigation Security Section Security Specialist.

dent of the District of Columbia Circuit and this Court. *Id.* at 16a-18a.[4]

6. By October 2004, when the appeal was filed, the factual investigation—other than the testimony of Miller and Cooper and any further investigation that might result from such testimony—was for all practical purposes complete. Gov't C.A. Br. in Opp. to Pet. for Rh'g 3. After the court of appeals issued its decision, the parties agreed to a stay of its mandate, and to the expedited filing of the certiorari petitions and briefs in opposition thereto, in order to afford this Court the opportunity to consider the petitions before its summer recess. Pet. C.A. Mot. for Stay of Mandate 1.

ARGUMENT

1. Cooper and Time contend that "[t]his Court's guidance is necessary to determine the existence and scope of a reporter's privilege." Cooper Pet. 8. Miller likewise contends that this Court should grant "plenary review" to decide "[t]he scope—indeed the existence—of a reporter's privilege." Miller Pet. 20. It is the government's position, as stated in the court of appeals (Gov't C.A. Br. 33-41), that no federal common law reporter's privilege should be recognized in the context of a good faith grand jury investigation. However, the court of appeals assumed that petitioners prevailed on their claim that a qualified privilege exists, and assumed that the privilege has the broadest possible scope. The court merely held that any such privilege has been overcome on the particular facts of this case. Whether the court of appeals erred in applying the legal principle advocated by petitioners to the specific

[4] The court of appeals also held that the Department of Justice guidelines, 28 C.F.R. 50.10, were not judicially enforceable. Miller Pet. App. 18a-21a.

facts of this case is not a question that warrants this Court's review. See Sup. Ct. R. 10.

In an attempt to surmount this difficulty, petitioners contend that their due process rights were violated by the procedure employed by the court of appeals in reviewing the facts—namely, the consideration of *ex parte* materials. Miller Pet. 27-29; Cooper Pet. 27-29. Certiorari is not warranted on that issue either. The court of appeals correctly rejected petitioners' due process claim, and, as Judge Tatel correctly recognized in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the court of appeals' decision on that point does not conflict with any decision of this Court or any other court of appeals.

a. In reaching its unanimous holding affirming the finding that Miller, Cooper, and Time were in contempt of court for refusing to provide evidence to a grand jury, the court of appeals assumed *arguendo* the existence of a qualified reporter's privilege. The court then analyzed the evidentiary submissions of the Special Counsel, and, applying the assumed qualified privilege to the facts, unanimously concluded that the privilege had been overcome. Indeed, the court concluded that the government's affidavits and exhibits overcame even the special version of the privilege for "leak" cases favored by Judge Tatel, which required not only showings of the essentiality of the evidence sought and the exhaustion of alternative sources, but the court's balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." Miller Pet. App. 58a.

The portion of Judge Tatel's opinion joined by the entire panel "carefully scrutinized [the Special Counsel's] voluminous classified filings" and concluded that he had

"met his burden of demonstrating that the information is both critical and unobtainable from any other source." Miller Pet. App. 66a. The opinion concluded that the Special Counsel had not only established the need for Miller's and Cooper's testimony, but had satisfied what Judge Tatel viewed as the appropriate balancing test for "leak" cases: "[C]onsidering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." *Id.* at 75a. Judge Tatel's opinion concluded: "Because identifying [petitioners'] sources * * * appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony." *Id.* at 77a.

Thus, although the court of appeals was "not of one mind on the existence of a common law privilege," the court was unified in concluding, "for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome." Miller Pet. App. 15a. As Judge Henderson's controlling opinion stated:

> Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not and therefore should not decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

Id. at 31a.

Cooper and Time call the conclusion of the court of appeals "deeply flawed" because (they say) "it makes no sense to deem the privilege 'overcome' without having *defined* the privilege." Cooper Pet. 25 n.7. This ignores

the fact that the court of appeals reached its holding by assuming the existence of a reporter's privilege the contours of which are described in great detail in Judge Tatel's opinion. See Miller Pet. App. 54a-64a (*Scope of the Privilege*). Indeed, as Judge Henderson observed (*id.* at 35a-38a), the version of the privilege formulated by Judge Tatel, with its balancing of the harm of the leak against the leaked information's value, erects a higher hurdle for the government than the privilege recognized by the District of Columbia Circuit in civil cases like *Zerilli* v. *Smith*, 656 F.2d 705, 713-714 (1981), which requires only showings of essentiality of the information and exhaustion of alternative sources. And it was the *Zerilli* version of the privilege that petitioners advocated in the court of appeals. Pet. C.A. Br. 42.[5]

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[5] Petitioners also claim that the decision of the court of appeals conflicts with this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), which recognized a psychotherapist/social worker privilege under Rule 501 of the Federal Rules of Evidence. Petitioners claim that the court of appeals "simply declined to engage in the analysis mandated by *Jaffe*" (Miller Pet. 26) and "misapplied *Jaffe*, in declining to recognize a common law [reporter's] privilege" (Cooper Pet. 19). Petitioners' contention thus appears to be that the court of appeals was mandated by *Jaffee* to decide whether there is a common law reporter's privilege (and decide that there is), even in a case where the court could assume the existence of such a privilege because it did not need to reach the issue to resolve the case before it. Petitioners' contention is without merit. Judge Henderson correctly concluded that the "doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available." Miller Pet. App. 32a n.1. (quoting *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment). In any event, in light of the court of appeals' conclusion that any privilege is overcome on the facts of this case, petitioners would be in the same position even if the court had explicitly recognized the privilege. This Court sits "to correct

b. In light of the court of appeals' decision, petitioners could prevail in this Court only if (1) there is an *absolute* reporter's privilege; (2) there is a qualified reporter's privilege broader in scope than that assumed to exist by the court of appeals; (3) the assumed qualified reporter's privilege was not overcome on the facts of this case; or (4) the court of appeals applied an improper procedure in deciding that the assumed qualified privilege was overcome. Petitioners do not make any of the first three arguments, and even if they did, none would provide a basis for certiorari.

In the court of appeals, in their joint reply brief and at oral argument, petitioners clarified that they were advocating (in the alternative) that the court create an absolute reporter's privilege protecting confidential sources. Pet. C.A. Reply Br. 15 n.7. The court of appeals unanimously rejected that argument: "[A]ll believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing." Miller Pet. App. 15a. Judge Tatel, the only member of the panel who favored adoption of a qualified privilege based on the approach outlined in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), concluded that an absolute privilege would not be in the public interest:

> Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several operatives in the late 1970s and early 1980s, including the agency's Athens station chief. *See Haig v. Agee*, 453 U.S. 280, 284-85 & n.7 (1981). Other leaks—the design for a top secret nuclear weapon, for example, or plans for an imminent military strike—could be even more damaging, causing

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wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

> harm far in excess of their news value. In such cases, the reporter's privilege must give way.. Just as attorney–client communications "made for the purpose of getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Miller App. 56a.

Petitioners do not advocate an absolute reporter's privilege in this Court, nor could they persuasively do so. While a very small number of jurisdictions have adopted *statutory* reporter's privileges that appear, on their face, to give absolute protection to confidential sources, see, *e.g.*, D.C. Code § 16-4701 *et seq.*, local jurisdictions do not have responsibility for investigating crimes implicating national security, and reason and experience strongly counsel against adoption of an absolute reporter's privilege in the federal courts. In any event, no court has recognized an absolute reporter's privilege as a matter of federal common law.

As for the possibility of a qualified privilege broader than the version of the privilege that the court of appeals assumed to exist, petitioners did not suggest the existence of such a privilege in the lower courts, and they do not do so in this Court. Indeed, in the lower courts, petitioners advocated a narrower version of the qualified privilege than the one assumed to exist by the court of appeals, and it is hard to conceive of a broader version.

Nor do petitioners argue that, in holding that any qualified privilege has been overcome, the court of ap-

peals relied on erroneous factual findings or misapplied the assumed privilege to the facts of this case. In any event, this Court does not grant certiorari to review factual findings or decide whether a legal standard was correctly applied to the facts of a particular case.

c. Petitioners do argue that the lower courts employed an improper procedure in applying the assumed qualified privilege to the facts of the case—namely, the consideration of *ex parte* submissions that contained a detailed description of much of the evidence previously gathered by the grand jury. Miller Pet. 27-28; Cooper Pet. 27-29. Petitioners contend that they were entitled to access to the submissions as a matter of due process. That contention is without merit.

i. Applying the assumed qualified privilege to the facts necessitated an evaluation by the lower courts of information concerning the full scope and breadth of the ongoing grand jury investigation. Although the government took the position that it was not legally required to do so, it provided the district court with a detailed description of the progress of the investigation, including extensive references to sensitive and classified grand jury information, such as the identities of witnesses, the substance of grand jury testimony, and the strategy or direction of the investigation. As the court of appeals correctly determined, the consideration of *ex parte* submissions was uniquely appropriate in that it "ensure[d] the secrecy of ongoing grand jury proceedings," Miller Pet. App. 18a (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam)), and at the same time permitted the court to consider "a detailed showing by the government that it has satisfied the criteria for overcoming the privilege," *id.* at 101a (Tatel, J., concurring in denial of rehearing en banc). In the latter respect, as Judge Tatel

observed, "far from violating due process," consideration of *ex parte* materials "affords a critical protection to journalists." *Ibid.*

The court of appeals also correctly rejected petitioners' suggested alternative procedures, such as disclosures to their counsel. Such procedures would have provided insufficient protection for grand jury secrecy, and would have inappropriately "engage[d] the district court and the prosecutor in lengthy collateral proceedings and in so doing divert[ed] the grand jury from its investigation." See *In re Sealed Case No. 98-3077*, 151 F.3d at 1072. In any event, the mere existence of alternative procedures is insufficient to establish that petitioners' rights were not fully protected by the lower courts' careful scrutiny of detailed *ex parte* submissions, or that the court of appeals erred in ruling that the district court did not abuse its discretion in accepting *ex parte* submissions. Miller Pet. App. 18a, 66a, 101a.

ii. Contrary to petitioners' contention (Miller Pet. 28; Cooper Pet. 27-28), the lower courts' consideration of the *ex parte* materials was not barred by any decision of this Court. As Judge Tatel noted in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the cases relied upon by petitioners involve situations far removed from the compulsion of grand jury testimony due to the rejection of a claim of privilege. See *In re Oliver*, 333 U.S. 257 (1948) (summary contempt proceeding arising from finding that a witness had testified evasively or falsely before judge sitting as "one-man grand jury," in which the witness had no right to the assistance of counsel, no time to prepare a defense, and no right to call witnesses or cross-examine the single witness against whose testimony the witness's testimony was being measured); *Greene* v. *McElroy*, 360 U.S. 474 (1959) (denial of ac-

cess, in challenge to revocation of contractor's security clearance, to information upon which revocation was based); *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion) (challenge to American citizen's classification and detention as an "enemy combatant" for a period of more than two and one half years without meaningful opportunity to contest detention).

Although this Court held that the litigants in each of those cases were entitled to examine and challenge the evidence against them, the disputed evidence in each case was limited and related to the litigant's own conduct. Moreover, in those cases, the potential consequences of the litigant's conduct was the central issue in the case before the Court. In this case, petitioners faced a coercive penalty of civil contempt because they refused to obey a lawful order to give evidence, rather than a penalty for past actions. The evidence contained in the *ex parte* submissions related to the *government's* conduct of the grand jury investigation. As Judge Tatel commented, "[t]o avoid incarceration, [petitioners] need not persuade the district judge that any accusation against them is false; they need only abandon their unlawful resistance and testify before the grand jury." Miller Pet. App. 102a-103a (citing *International Union, UMWA* v. *Bagwell*, 512 U.S. 821, 828 (1994)). No case holds that a recalcitrant grand jury witness may not be held in contempt unless he or she first is provided with disclosure of all the other evidence gathered by the grand jury to date.

In fact, the procedure employed by the lower courts is fully consistent with, and supported by, this Court's decisions. As Judge Tatel noted (Miller Pet. App. 103a), this Court approved the use of *ex parte* proceedings to determine the reasonableness and enforceability of grand jury subpoenas in *United States* v. *R. Enter-*

prises, Inc., 498 U.S. 292 (1991). Although the witnesses could have been exposed to coercive measures upon a denial of their motion to quash, this Court observed that, "to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." *Id.* at 302. This Court also has made clear in other contexts that recalcitrant grand jury witnesses are not entitled to extensive discovery. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973) (holding grand jury witness not entitled to showing of reasonableness before being compelled to give voice exemplar, and stating "[a]ny holding would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"); *United States* v. *Mara*, 410 U.S. 19, 22 (1973) (no showing necessary to obtain handwriting exemplars from grand jury witness).

Moreover, as the lower courts found, the use of *ex parte* submissions was necessary to protect the secrecy of an ongoing grand jury investigation, and therefore was fully consistent with this Court's numerous decisions that emphasize that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979). See also *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). As Judge Tatel correctly noted:

> Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth.

Miller Pet. App. 101a-102a.

iii. Petitioners are also mistaken in their contention (Miller Pet. 27-28; Cooper Pet. 28-29) that the court of appeals' decision conflicts with decisions of the Second and Ninth Circuits. As Judge Tatel correctly noted in his opinion concurring in the denial of rehearing en banc, the cases relied upon by petitioners involved situations that do not "remotely resemble[]" the situation here. Miller Pet. App. 102a. See *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) (holding that witness whose claimed memory loss was challenged in a contempt proceeding based on the testimony of a second witness was entitled to examine and confront the testimony of the second witness); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) (ordering evidentiary hearing concerning a grand jury witness's refusal to testify based on alleged illegal surveillance and alleged inadequacy of immunity). Neither case involved a refusal to testify based on a claimed testimonial privilege,[6] and neither

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[6] Indeed, the witness in *Kitchen* did not refuse to testify at all, but rather claimed not to remember details regarding which he was questioned. As Judge Tatel noted, the situation in *Kitchen* was "more akin to punishment for perjury than evaluation of a privilege claim," and the court in *Kitchen* recognized the "need for 'heightened' procedural protection '[w]hen a case is in the grey

involved a demand for access to grand jury materials nearly as broad as the demand made by petitioners in this case.[7]

d. Even if the court of appeals had endorsed the Special Counsel's position that there is no reporter's privilege rooted in federal common law in the context of a good faith grand jury investigation, review by this Court would still be unwarranted, because, contrary to petitioners' contention (Miller Pet. 21-26; Cooper Pet. 14-16), there is no circuit conflict on that issue. No court of appeals has recognized a federal common law reporter's privilege in the grand jury context. Petitioners rely (Miller Pet. 26; Cooper Pet. 15) on *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992), but the Third Circuit's decision in that case is an affirmance, without opinion, by an equally divided en banc court, and thus lacks precedential value, see *Rutledge* v. *United States*, 517 U.S. 292, 304 (1996); *Tunis Bros. Co.* v. *Ford Motor Co.*, 763 F.2d 1482, 1501 (3d Cir. 1985).[8]

2. In addition to holding that any common law reporter's privilege has been overcome on the facts of this

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area between contempt and perjury.'" Miller Pet. App. 102a (quoting *Kitchen*, 706 F.2d at 1272).

[7] Whereas the *ex parte* submission in this case covered the full breadth and scope of the grand jury's ongoing investigation, the contempt findings at issue in *Kitchen* and *Alter* turned on discrete factual determinations requiring (in *Kitchen*) the disclosure of the testimony of a single witness and (in *Alter*) the disclosure of no grand jury materials whatever.

[8] Petitioners also rely (Miller Pet. 26; Cooper Pet. 15) on a second district court decision, *New York Times* v. *Gonzales*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005), but a conflict between court of appeals decisions and district court decisions is not a basis for certiorari. See Sup. Ct. R. 10.

case, the court of appeals held that there is no First Amendment reporter's privilege in the context of a good faith grand jury investigation. Petitioners also seek review of that holding. But as the court of appeals correctly recognized (Miller Pet. App. 7a-15a), this Court has already held in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that there is no First Amendment reporter's privilege in the grand jury context. Contrary to petitioners' contention, moreover, there is no conflict among the courts of appeals on that question. And this would not be an appropriate case to reconsider the issue, because any First Amendment privilege would be no broader than the common law privilege whose existence the court of appeals assumed, and it would thus be overcome on the facts of this case for the same reasons the common law privilege was overcome.

a. In *Branzburg*, the Court held that journalists, like other citizens, must "respond to relevant questions put to them in the course of a valid grand jury investigation." 408 U.S. at 690-691; see *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg* for the proposition that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source"); *University of Pa.* v. *EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"). The Court rejected the suggestion that courts should conduct a case-by-case balancing of interests each time a reporter is subpoenaed by a grand jury. Instead the Court struck

a one-time balance: the state's interest in "law enforcement and in ensuring effective grand juries" justifies the "burden on First Amendment rights" when "reporters [are required] to give testimony in the manner and for the reasons that other citizens are called." *Branzburg*, 408 U.S. at 690, 700. The Court refused to grant news sources a privilege not granted to law enforcement informants in criminal cases. *Id.* at 698.

In striking this balance, the Court carefully analyzed the competing interests. The reporters claimed that newsgathering would be significantly impeded, 408 U.S. at 680, but the Court concluded that requiring testimony from reporters in cases where news sources are "implicated in crime or possess information relevant to the grand jury's task" would not seriously impede newsgathering, *id.* at 691. The Court observed that many news sources have a "symbiotic" relationship with the press "which is unlikely to be inhibited by the threat of subpoena." *Id.* at 694. Noting that predictions of a constricted flow of news were to "a great extent speculative" and that such predictions often are made by persons with "professional self-interest," the Court stated that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." *Id.* at 693. The Court concluded that "the lesson history teaches us" is that "the press has flourished" without special privileges. *Id.* at 698, 699.

The Court also weighed the claimed adverse effect on newsgathering against the public interest in law enforcement. The Court concluded that, even if some news sources were deterred, it could not "accept the argument that the public interest in possible news

about crime from undisclosed and unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." 408 U.S. at 695. The Court also stated that case-by-case balancing of interests would embroil the courts in "preliminary factual and legal determinations" that would "present practical and conceptual difficulties of a high order." *Id.* at 704, 705.

At the end of its opinion in *Branzburg*, the Court noted that "news gathering is not without its First Amendment protections." 408 U.S. at 707. The Court stated that, in cases where grand jury investigations are being conducted in bad faith, without legitimate law enforcement purposes, or to harass the press or disrupt relationships with news sources, a court would be authorized to grant a motion to quash on First Amendment grounds. *Ibid.*[9]

Justice Powell, who joined the Court's opinion, wrote a brief concurring opinion underscoring the point made by the Court in the concluding portion of its opinion. 408 U.S. at 701-710. The best reading of Justice Powell's concurring opinion, and the only reading that reconciles his opinion with the fact that he joined the opinion of the Court, is that he was elaborating on the role of courts in cases of bad faith investigations. Justice Powell's references to a "claim to privilege" and "case-by-case" balancing should thus be read as limited

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[9] That the Court grounded its admonition against harassment in the First Amendment is not surprising inasmuch as *Branzburg* involved several consolidated state cases. Only the Constitution could provide the basis for this Court to require the states to recognize a basis for a motion to quash.

to cases of alleged harassment. *Id.* at 710. Justice Powell's later opinions are fully consistent with this interpretation of his concurring opinion in *Branzburg*. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring); *Saxbe* v. *Washington Post*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting). There is nothing to suggest that Justice Powell intended to transform the clear language of the Court's opinion, and, as the court of appeals observed, "whatever Justice Powell specifically intended, he joined the majority." Miller Pet. App. 14a.[10]

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[10] Petitioners suggest (Miller Pet. 9; Cooper Pet. 25-26) that the number of subpoenas to reporters has increased, with potential negative effects on newsgathering. Petitioners offer the selfsame arguments and evidence that were advanced in *Branzburg*, including claims of an unprecedented assault on the press (408 U.S. at 699) and affidavits from members of the press predicting the drying up of sources and seriously diminished news gathering (*id.* at 693, 694). Events since 1972 continue to teach the same lesson that history taught the Court in *Branzburg*—namely, that the lack of a federal reporter's privilege in the grand jury context has not had the negative effects that were predicted. Petitioners' claim of adverse effects on news gathering amounts to an argument that proves too much: "If newsmen's confidential sources are as sensitive as they are claimed to be," as *Branzburg* observed, "it would appear that only an absolute privilege would suffice." *Id.* at 702. In fact, confidential sources may be disclosed in a variety of ways, including by the reporters themselves. See, *e.g.*, Stephen Bates, *The Reporter's Privilege, Then and Now* 11 (Research Paper R-23) (Apr. 2000), *available at* http://www.ksg.harvard.edu/presspol/Research_Publications/Papers/Research_Papers/R23.pdf; Kathryn M. Kase, Note, *When a Promise is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 Hastings Comm. & Ent. L.J. 565, 576-577 (1990); Monica Langley & Lee Levine, *Broken Promises*, Col. Journalism Rev., July-Aug. 1998, at 21. Indeed, as a result of self-regulation by the Department of Justice, through its guidelines for the issuance of media subpoenas (a factor considered by the Court

b. Petitioners contend (Miller Pet. 11-20; Cooper Pet. 21-23) that there is a conflict in the circuits regarding the existence of a reporter's privilege grounded in the First Amendment. But no court of appeals has recognized a First Amendment reporter's privilege in the circumstances of a grand jury investigation conducted in good faith. To the contrary, every federal court of appeals to address the issue, consistent with the court of appeals' decision in this case, and consistent with *Branzburg*, has refused to recognize a First Amendment reporter's privilege in that context. See *In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *In re Grand Jury Proceedings, Storer Communications*, 810 F.2d 580, 584-585 (6th Cir. 1987). See also *In re Special Proceedings*, 373 F.3d 37, 44, 45 (1st Cir. 2004) (holding that *Branzburg* precludes recognition of a First Amendment reporter's privilege in connection with special prosecutor's investigation, a context the court found analogous to a grand jury investigation). As noted above, the Third Circuit decision upon which petitioners rely (Miller Pet. 14; Cooper Pet. 21), *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992), is an affirmance, without opinion, by an equally divided en banc court, and thus lacks precedential value.

In applying a reporter's privilege in contexts *other* than a grand jury investigation, the courts of appeals have distinguished *Branzburg*, and expressly acknowledged that *Branzburg* precludes recognition of a First Amendment privilege in the context of a good faith

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in *Branzburg*, 408 U.S. at 706-707), the subpoenas attributable to federal grand jury investigations and prosecutions represent a small minority of the subpoenas identified in the petitions.

grand jury investigation. *See, e.g., Zerilli*, 656 F.2d at 711 (distinguishing *Branzburg* on the ground that the Supreme Court "justified the decision by pointing to the traditional importance of grand juries and the strong public interest in effective criminal investigation"); *Baker* v. *F&F Investment*, 470 F.2d 778, 784-785 (2d Cir. 1972) ("the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the [civil] case before us"); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 9 (2d Cir.) ("we are dealing here with a civil action rather than questioning by a grand jury"), cert. denied, 459 U.S. 909 (1982). As these decisions correctly recognize, this Court's decision in *Branzburg* turned on the unique and vital role of the grand jury in our criminal justice system. As the Court observed in *Branzburg*:

> The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.

408 U.S. at 686-687 (footnote omitted). The Court's holding clearly articulated the importance of the grand jury's role, and the paramount public interest in law enforcement:

> We are asked to create another [testimonial privilege for unofficial witnesses] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function

> of government and the grand jury plays an important, constitutionally mandated role in this process.

Id. at 690 (footnote omitted). By distinguishing the grand jury from other legal contexts, the courts of appeals have consistently, and correctly, followed *Branzburg*'s teaching.

c. Cooper and Time argue that, "even if the D.C. Circuit's reading of *Branzburg* were correct, the change in First Amendment law since that time makes this case uniquely appropriate for this Court's review." Cooper Pet. 24 (citing *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622 (1994), and *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001)). But neither of the decisions cited in the petition addressed the balancing of First Amendment interests against interests related to the historically unique role of grand juries in the investigation of crimes. In any event, this case would not be a suitable vehicle for reconsidering *Branzburg* even if the Court were inclined to do so, because a First Amendment privilege would be no broader than the common law privilege assumed to exist by the court of appeals, and thus would be overcome in this case for the same reasons the assumed common law privilege was overcome.[11]

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[11] Petitioners also rely (Miller Pet. 19-20 & n.19; Cooper Pet. 21-22 & n.6) on decisions of state courts. All but two, however, involve application of a First Amendment reporter's privilege in contexts other than the grand jury, and only one of those two was decided after *Branzburg*. That case, *In re Letellier*, 578 A.2d 722 (Me. 1990), was wrongly decided. It misconstrued *Branzburg* and relied upon prior decisions of the First Circuit applying a reporter's privilege in civil proceedings. *Id.* at 724-726. This would not be an appropriate case for resolving any conflict between the lone state decision cited by petitioners and the decisions of the federal courts

3. The Special Counsel seeks to bring the ongoing investigation, which he began in December 2003, to as swift a conclusion as possible. By fall 2004, the Special Counsel's investigation was for all practical purposes complete except for the testimony of Miller and Cooper. The unsuccessful negotiations with petitioners and the litigation on the motions to quash and the contempt citations has proceeded in the months since then. The Special Counsel has endeavored to expedite the proceedings to the extent possible. After rehearing was denied in the court of appeals, the Special Counsel agreed to stay the mandate upon the agreement of petitioners to a schedule that would allow the filing of the certiorari petitions, the briefs of *amici*, the brief in opposition, and petitioners' reply briefs in time for this Court to consider the petitions before its summer recess. The Special Counsel respectfully requests that the Court deny the petitions at its earliest possible opportunity, so that the investigation can be brought to a close.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2005

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of appeals, however, because any First Amendment privilege would be overcome in this case.

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IN THE

Supreme Court of the United States

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

A. The Special Counsel's Assertion That He Would Be Able To Defeat Whatever Reporter's Privilege This Court Might Recognize Is Irrelevant At The Certiorari Stage And Baseless In Any Event. 2

B. The Federal Common Law And First Amendment Questions Warrant This Court's Review. 5

1. Federal Common Law 5

2. The First Amendment 7

C. The Due Process Question Warrants This Court's Review. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

CASES

Branzburg v. Hayes, 408 U.S. 665 (1972) ..... *passim*

Butterworth v. Smith, 494 U.S. 624 (1990) 8

Delaney v. Superior Court, 789 P.2d 934 (Cal. 1990) 4

Greene v. McElroy, 360 U.S. 474 (1959) 9

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) 8, 9

In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993) 6

In re Grand Jury Subpoena of Williams, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) 6

In re Kitchen, 706 F.2d 1266 (2d Cir. 1983) 10

In re Letellier, 578 A.2d 722 (Me. 1990) 7

In re Oliver, 333 U.S. 257 (1948) 9

Jaffee v. Redmond, 518 U.S. 1 (1996) 1, 4, 6

New York Times Co. v. Gonzales, 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005) 6

Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) 7

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 6

UMWA v. Bagwell, 512 U.S. 821 (1994) 10

United States v. Alter, 482 F.2d 1016 (9th Cir. 1973) 10

United States v. Calandra, 414 U.S. 338 (1974) 5

United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) 6

United States v. Dionisio, 410 U.S. 1 (1973) 10

United States v. Mara, 410 U.S. 19 (1973) 10

United States v. R. Enters., Inc., 498 U.S. 292 (1991) 10

CONSTITUTIONAL PROVISIONS

U.S. CONST., AMEND. I ..... *passim*

U.S. CONST., AMEND. V ..... *passim*

RULES

FED. R. CRIM. P. 6(e) 9

FED. R. EVID. 501 ..... 1, 5, 6

FED. R. EVID. 1101 ..... 5, 8, 10

STATUTES

Cal. Const. art. I, § 2(b) 4

MINN. STAT. § 595.024 4

N.M. STAT. ANN. § 38-6-7 4

N.D. CENT. CODE § 31-01-06.2 4

OTHER AUTHORITIES

Todd S. Purdum, *"Deep Throat" Unmasks Himself: Ex-No. 2 at F.B.I.*, N.Y. TIMES, Jun. 1, 2005 7

REPLY BRIEF

The Special Counsel devotes most of his 29-page Opposition ("Opp.") to arguing that the Court should deny certiorari because, even if petitioners are correct, and there exists a federal reporter's privilege, he thinks he will be able to defeat it based on his *ex parte* evidentiary submission. Opp. 10-21. The Special Counsel is incorrect—and a respondent's claim that he will win on the merits is not a basis for denying review in any event—but the merits-based focus of the Special Counsel's brief is itself quite telling: By his silence in the face of so many compelling reasons to grant review, the Special Counsel effectively concedes that petitioners have satisfied the standards for obtaining certiorari.

Indeed, the Special Counsel fails to address, let alone dispute, the fact that the federal courts are in utter chaos over how to interpret this Court's 5-4 decision 33 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972), or that the legal landscape has changed dramatically since *Branzburg* in a way that strongly supports recognition of confidential source protection. Since *Branzburg*, an overwhelming state consensus has developed recognizing confidential source protection; since *Branzburg*, Congress has affirmatively directed the federal courts to develop privileges under Rule 501; and since *Branzburg*, this Court's First Amendment jurisprudence has developed in a manner that has superseded *Branzburg*'s approach. Nor can the Special Counsel muster any response to petitioners' argument that Rule 501 and *Jaffee v. Redmond*, 518 U.S. 1 (1996), require recognition of a federal common law reporter's privilege.

The Special Counsel's assertion that there is no need for review under these compelling circumstances rings especially hollow in light of the *amicus* brief filed by 34 States and the District of Columbia. Relying on *Jaffee*, and emphasizing that 49 States and the District have now adopted reporter's "shield laws," the chief law enforcement officers of these jurisdictions urge this Court to grant review because the lack of

comparable federal protection—or "[u]ncertainty and confusion" regarding the existence of such protection—"undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them." States Br. 2-3.

The Special Counsel has no answer to any of these arguments. He does not and cannot deny that this is a case of national importance. And he fails in his attempt to distinguish decisions of this Court and two Circuits holding that the Due Process Clause requires that defendants be afforded the chance to review and challenge the evidence against them before they may be imprisoned.

A. The Special Counsel's Assertion That He Would Be Able To Defeat Whatever Reporter's Privilege This Court Might Recognize Is Irrelevant At The Certiorari Stage And Baseless In Any Event.

The Special Counsel's main argument is that the court of appeals "assumed" that a federal common law privilege exists and "merely held that any such privilege had been overcome on the particular facts of this case." Opp. 10. According to the Special Counsel, this ruling was correct and eliminates any basis for granting certiorari because it demonstrates that he will be able to defeat whatever privilege this Court might recognize. *Id.* at 11-16. The Special Counsel is wrong.

First, it is misleading to suggest that the court of appeals simply "assumed" that a federal reporter's privilege exists—to the contrary, the panel members sharply disagreed on this very issue, generating four separate opinions. Pet. App. 16a ("The Court is not of one mind on the existence of a common law privilege."); *id.* 24a-34a (Sentelle, J., concurring) (arguing against privilege and that only this Court can recognize one in light of *Branzburg*); *id.* 35a-44a (Henderson, J., concurring) (rejecting Judge Sentelle's view, but "declining to decide whether a reporter's privilege exists or to define its contours"); *id.* 45a-85a (Tatel, J., concurring) (urging recognition of a privilege). Far from making this the narrow, fact-bound issue the Special Counsel seeks to portray, the stark

conflict among the panel members mirrors what has been happening in the federal courts for three decades and powerfully supports the need for this Court's review. Pet. 8-21.

Second, while the panel did agree that "*if* [a common law] privilege applies here, it has been overcome" by the Special Counsel's *ex parte* evidentiary proffer, Pet. App. 16a (emphasis added), that hypothetical pronouncement based on secret evidence cannot possibly obviate the need for this Court's review. The court's reliance on the Special Counsel's *ex parte* submission as a basis to imprison and fine petitioners itself raises an important due process question that warrants review. Pet. 27-29; *see also infra* 9-10.

Moreover, because the court refused to decide whether a common law privilege exists, it never defined the contours of such a privilege; it is thus impossible to claim that the privilege provides no protection in this case. Judge Tatel correctly observed that "we cannot resolve this case without adopting some standard," Pet. App. 51a, but that is exactly what the court purported to do. Although Judge Tatel himself proposed a standard, Judge Henderson criticized it, and "she never indicate[d] what standard she would apply." *Id.* Indeed, while Judge Henderson stated that "the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," Pet. App. 35a, she never assumed that a particular standard applies let alone analyzed any alternative formulations of the privilege. As Judge Tatel put it, "[w]ithout ruling out all such plausible alternatives that would allow the reporters to prevail, how could one know that they cannot prevail here? And without selecting some other test based on *Jaffee* and Rule 501, how could one know that such alternatives are plausible?" *Id.* 51a-52a.

The Special Counsel incorrectly suggests that petitioners intended to limit their arguments as to the potential scope of the privilege because they did not specifically ask the Court to adopt a particular standard in their Petition. Opp. 15-16. But petitioners did not discuss how to define the contours of

a common law or First Amendment privilege because those are issues that go to the merits, not because they intended to endorse or rule out any particular formulation.

In fact, there are numerous "plausible alternatives that would allow the reporters to prevail." Pet. App. 51a. For example, this Court, much as it did in *Jaffee*, may decide to "reject the balancing component of the privilege," and hold that the privilege generally protects confidential sources, subject to certain clearly defined exceptions designed to avert serious and imminent future harm. *See Jaffee*, 518 U.S. at 17-18 & n.19 ("we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist"); *see also* Pet. App. 119a (Tatel, J., concurring in denial of rehearing en banc) (noting the possibility that reporters may hold a "qualified privilege, that is, a privilege subject to exceptions, much like the crime-fraud exception to the attorney-client privilege, and the imminent-harm exception for psychotherapist-patient communications") (citation omitted). Alternatively, this Court could decide that there is a reporter's privilege that applies unless protecting the source in the particular case would "'cause a miscarriage of justice.'" *Id.* 51a (citing N.D. CENT. CODE § 31-01-06.2; MINN. STAT. § 595.024; N.M. STAT. ANN. § 38-6-7).[1]

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[1] The Special Counsel incorrectly suggests that the choice this Court will face is between an "absolute" privilege and a "qualified" privilege that consists of a balancing test. In fact, the term "absolute" privilege is a misnomer. Even States with ostensibly "absolute" reporter's privileges, *e.g.*, Cal. Const. art. I, § 2(b), recognize exceptions. *See Delaney v. Superior Court*, 789 P.2d 934, 946-51 (Cal. 1990) (noting exception to absolute immunity provided by shield law where application jeopardizes criminal defendant's right to a fair trial and applying balancing test in such circumstances). Labels aside, the real choice is the one addressed in *Jaffee*—between (1) a privilege, subject to exceptions and (2) a balancing approach. As the *Jaffee* Court explained in choosing the former, "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty

The Special Counsel has offered no indication that he can meet an imminent-harm, miscarriage-of-justice, or similar standard and defeat the privilege in this case. Nor have petitioners been afforded the right to review and refute the Special Counsel's arguments and evidence for overriding any qualified balancing test this Court might establish. Accordingly, the Special Counsel's belief that he would be able to defeat, based on secret evidence, whatever federal privilege might be recognized cannot overcome the compelling reasons for granting certiorari in this case.

B. The Federal Common Law And First Amendment Questions Warrant This Court's Review.

1. Federal Common Law

The Special Counsel does not dispute petitioners' description of the conflicts among the circuits regarding the existence of a federal common law reporter's privilege under Rule 501. *See* Pet. 14-16. His only response is to contend that "there is no circuit conflict on [the] issue" whether such a privilege exists "in the context of a good faith grand jury investigation." Opp. 21. But he cites no other privilege known to law that applies everywhere except in the grand jury, and he ignores Federal Rule of Evidence 1101(c), which expressly provides that "[t]he rule with respect to privileges applies *at all stages* of *all actions, cases, and proceedings*" (emphasis added); *see also* FED. R. EVID. 1101(d)(2) (providing that Federal Rules of Evidence do not apply to grand jury proceedings "other than with respect to privileges"); *United States v. Calandra*, 414 U.S. 338, 346 (1974); Pet. 16.

Under Rule 1101, the many decisions recognizing a reporter's privilege in civil and criminal cases apply with equal force in the grand jury context and therefore conflict with the

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[Footnote continued from previous page]

whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 518 U.S. at 17-18 (citation omitted).

ruling below and with other decisions rejecting the privilege in connection with grand jury subpoenas. *Compare United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) ("journalists have a federal common-law qualified privilege arising under Fed. R. Evid. 501 to refuse to divulge their confidential sources") *with In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993) (rejecting common law reporter's privilege in case involving grand jury subpoena). Indeed, courts have recognized the privilege in the grand jury context by relying on decisions in civil and criminal cases. *See, e.g., In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc); *New York Times Co. v. Gonzales*, 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005).

The Special Counsel does not even attempt to respond to petitioners' argument that *Jaffee* and Rule 501 virtually compel recognition of a federal common law reporter's privilege. Pet. 16-20; *see also* States' Br. 6 ("Here, as in *Jaffee*, a 'consistent body' of policy determinations by State legislatures reflects both 'reason' and 'experience.'") (citations omitted). To be sure, the Special Counsel argues that petitioners have failed to produce sufficient proof that the absence of federal protection of confidential sources will impair newsgathering and thus the free flow of information to the public, Opp. 25 n.10 (citing *Branzburg*), but *Branzburg*'s apparent demand for empirical proof of the need for a privilege squarely contradicts *Jaffee*, 518 U.S. at 10, as well as *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (applying Rule 501 to hold that attorney-client privilege survives client's death despite finding the "empirical evidence . . . scant and inconclusive"). This contradiction among the Court's decisions further supports review. Pet. 20-21.

Moreover, the undisputed record in this case, decisions of federal and state courts, as well as state legislatures, and our nation's history provide irrefutable proof that confidential sources are essential to effective news reporting. *See* Brief *Amici Curiae* of ABC, Inc., *et al.* at 6; Pet. 9-10, 25-26; *see also, e.g.*, Todd S. Purdum, *"Deep Throat" Unmasks*

Himself: Ex-No. 2 at F.B.I., N.Y. TIMES, Jun. 1, 2005 at A1, A15 (Carl Bernstein: "This is a case history and a case lesson of why it is so important that we have confidential sources .... There's no way this reporting could have been done, nor is there any way that good reporting at a lot of places can be done, without anonymous sources.").

2. The First Amendment

The Special Counsel argues at length, based on his reading of *Branzburg*, that he is correct on the merits and that there is no First Amendment-based reporter's privilege. Opp. 22-25. But he does not dispute that federal courts, and state courts of last resort, are sharply divided and confused regarding what *Branzburg* means on this very issue. Pet. 21-25. The Special Counsel simply takes one side in the debate that has raged around the nation for more than 30 years, and disregards the decisions that reject his interpretation.

Thus, for example, the Special Counsel relies on what he calls the "best reading of Justice Powell's concurring opinion," arguing that Justice Powell, whose vote was necessary to the majority, was merely "elaborating on the role of courts in cases of bad faith investigations." Opp. 24. But numerous circuit court decisions have taken precisely the opposite view—that Justice Powell's concurrence articulated his understanding that the Court intended to allow for development of First Amendment-based protection of confidential sources. Pet. 11-12; *see, e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 715-16 (3d Cir. 1979) (explaining that Justice Powell "cast the deciding vote in *Branzburg*" and applying balancing test). Likewise, when confronted with a clear conflict between the decision below, rejecting a First Amendment privilege in the grand jury context, and the decision of a state court of last resort recognizing such a privilege, *In re Letellier*, 578 A.2d 722, 726 (Me. 1990), the Special Counsel simply announces that the latter "was wrongly decided." Opp. 28 n.11. But the issue at this stage, of course, is not which position is *correct*; the relevant question is whether there is conflict in the courts,

and the Special Counsel's merits-based argument is a glaring acknowledgment that such conflict exists.

The Special Counsel again seeks to distinguish some decisions on the basis that this case arises in the grand jury context, Opp. 26, but privileges do not vary in federal court depending on the nature of the proceedings. FED. R. EVID. 1101. And "grand juries are expected to 'operate within the limits of the First Amendment,' as well as the other provisions of the Constitution." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (quoting *Branzburg*, 408 U.S. at 708).

To the extent that some courts have felt constrained by *Branzburg* from recognizing First Amendment protection for confidential sources, it is time to revisit *Branzburg* because recent trends in this Court's jurisprudence fundamentally undermine *Branzburg*'s rationale. Pet. 24. The Special Counsel notes that the First Amendment cases cited by petitioners did not involve grand jury proceedings, Opp. 28 & n.11, but he does not deny the more basic point—that *Branzburg* clashes with this Court's more recent decisions holding "that generally applicable laws . . . require heightened scrutiny when they pose a genuine risk to First Amendment values." Br. *Amici Curiae* of American Society of Newspaper Editors, *et al.* at 2; *id.* at 3-11 (canvassing case law). This Court alone has the power to resolve the tension between *Branzburg* and its modern First Amendment jurisprudence.

C. The Due Process Question Warrants This Court's Review.

The decision below directly conflicts with decisions from this and other courts forbidding, as a matter of due process, imprisonment based on secret evidence. Pet. 27-29. The Special Counsel contends that this case is distinguishable because the privilege issue requires analysis of "the *government's* conduct of the investigation" rather than "the litigant's conduct." Opp. 18. But *Hamdi v. Rumsfeld* holds that where the "most elemental of liberty interests—the interest in being free from physical detention by one's own government" is at stake, due process requires that an imprisoned

person have received "notice of the factual basis for his [detention], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 124 S. Ct. 2633, 2646-48 (2004). *Accord In re Oliver*, 333 U.S. 257 (1948); *Greene v. McElroy*, 360 U.S. 474 (1959). Neither *Hamdi* nor any other case recognizes the Special Counsel's purported distinction, which is baseless. The district court in this case made rulings that resulted in an order of physical detention. Under *Hamdi*, petitioners have a due process right to know, and must be given the chance to rebut, the facts and arguments that supposedly support the confinement order.

The Special Counsel concedes the availability of alternative procedures, such as disclosure to counsel under a protective order, but claims that any alternative "would have provided insufficient protection for grand jury secrecy." Opp. 17. The Special Counsel provides no support for this bare assertion, nor explains why this proceeding demands greater secrecy than *Hamdi* and other enemy combatant cases, where counsel have been allowed access to the evidence used to justify their clients' confinement.[2] Although the Special Counsel faults petitioners for failing to "argue that . . . the court of appeals relied on erroneous factual findings," Opp. 15-16, the entire point of petitioners' due process challenge is that the Special Counsel and the court have *withheld* the facts from them. The fact that the confinement order arises from a contempt proceeding raises special concerns, as this Court has recognized that "[u]nlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to

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[2] The Special Counsel does not suggest that petitioners' counsel would not abide by a protective order issued under Fed. R. Crim. P. 6(e). Moreover, the Special Counsel exaggerates the importance of grand jury secrecy in characterizing it as an absolute, when witnesses are free to disclose their testimony, and the subject matter here is widely known to witnesses, subjects and targets. Finally, although the Special Counsel suggests that allowing petitioners access to its secret submission "risks tainting . . . later testimony," Opp. 20, he admits that other than the testimony from Mr. Cooper and Ms. Miller, "the factual investigation" is "for all practical purposes complete." Opp. 10.

be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *UMWA v. Bagwell*, 512 U.S. 821, 831 (1994).

The Special Counsel contends that petitioners seek "extensive discovery" and "disclosure of all the other evidence gathered by the grand jury to date." Opp. 18-19 (citing *United States v. Dionisio*, 410 U.S. 1 (1973), and *United States v. Mara*, 410 U.S. 19 (1973)), and on that basis seeks to downplay the conflict between the ruling below and the decisions in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983), and *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973). But petitioners are not seeking discovery from the Special Counsel. All they seek is access to the Special Counsel's *ex parte* submission, the contents of which were selected by the Special Counsel to support his arguments for holding petitioners in contempt and incarcerating Mr. Cooper.

The Special Counsel also asserts that this Court "approved" the use of secret evidence in *United States v. R. Enters., Inc.*, 498 U.S. 292 (1991). Opp. 18-19. But in that case, the Court addressed the reasonableness standard for subpoenas under FED. R. CRIM. P. 17, and did not address the question presented here—whether a witness asserting a *privilege* is entitled to see the evidence and legal arguments against him before he is imprisoned. This Court did not "approve" *ex parte* proceedings, but simply noted in dicta that a court assessing the reasonableness of a subpoena may require additional disclosures from the government. *Id.* at 302. Although the Court noted that certain procedural protections are limited in the grand jury context, *id.* at 297-99, privileges are fully applicable. *See* FED. R. EVID. 1101. The Due Process Clause simply will not tolerate the use of secret evidence to incarcerate or fine witnesses who assert such privileges.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JUDITH MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., CABLE NEWS NETWORK LP, LLLP, CBS BROADCASTING INC., DOW JONES & COMPANY, INC., DR PARTNERS D/B/A STEPHENS MEDIA GROUP, GANNETT CO., INC., GRAY TELEVISION, INC., GRUNER + JAHR USA PUBLISHING, THE HEARST CORPORATION, LANDMARK COMMUNICATIONS, INC., MAGAZINE PUBLISHERS OF AMERICA, MEDIA GENERAL, INC., THE NATIONAL NEWSPAPER ASSOCIATION, NATIONAL PUBLIC RADIO, INC., NBC UNIVERSAL, NEWSWEEK, INC., RANDOM HOUSE, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, TRIBUNE COMPANY AND THE WASHINGTON POST IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE DECISION BELOW RAISES AN ISSUE OF CENTRAL IMPORTANCE TO THE OPERATION OF A FREE PRESS	2
A. The Number of Federal Subpoenas Demanding Disclosure of Reporters' Sources Has Reached Unprecedented Levels	2
B. Confidential Sources Are Often Essential to Informing the Public About Matters of Vital Concern	5
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PROTECTION OF ANONYMOUS SPEECH AND THE HISTORICAL TRADITION ON WHICH THAT PROTECTION IS PREMISED	15
CONCLUSION	20
APPENDIX A	A1
APPENDIX B	B1

TABLE OF AUTHORITIES

CASES Page

Branzburg v. Hayes, 408 U.S. 665 (1972)..... *passim*
Buckley v. Valeo, 424 U.S. 1 (1976)..... 18
Burdick v. United States, 236 U.S. 79 (1915)..... 19
Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) 4
In re Grand Jury Subpoenas, 8 Media L. Rep. 1418 (D. Colo. 1982)..... 3
In re Grand Jury Subpoenas, 29 Media L. Rep. 2301 (5th Cir. 2001) 4
Jaffee v. Redmond, 518 U.S. 1 (1996)..... 19
Lee v. U.S. Department of Justice, 287 F. Supp. 2d 15 (D.D.C. 2003)..... 5
Lee v. U.S. Department of Justice, 327 F. Supp. 2d 26 (D.D.C. 2004)..... 5
McConnell v. FEC, 540 U.S. 93 (2003) 18
McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) ..... *passim*
Mills v. Alabama, 384 U.S. 214 (1966)..... 6
New York Times Co. v. United States, 403 U.S. 713 (1971)..... 9, 10
Rosenberg v. Carroll, 99 F. Supp. 629 (S.D.N.Y. 1951)..... 19
In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004)..... 4
Talley v. California, 362 U.S. 60 (1960)..... 16, 18
Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002).. 18
In re Williams, 963 F.2d 567 (3d Cir. 1992) 3

RULES

S. Ct. R. 37.2(a)..... 1
S. Ct. R. 37.6..... 1

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

Jim Anderson, *Washington News*, UNITED PRESS INTERNATIONAL, Oct. 27, 1986 9

Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996 11

John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001 12

Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids,* S.F. CHRONICLE, Dec. 2, 2004 13

Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004 13

Mark Fainaru-Wada & Lance Williams, *What Bonds Told BALCO Grand Jury,* S.F. CHRONICLE, Dec. 3, 2004 13

Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995 8

Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001 8

Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989 10

Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004 12

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TABLE OF AUTHORITIES—Continued

Page

Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995..... 11

Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004 12

Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984 10

Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977 10

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The Right of a Newsman to Refrain from Divulging the Sources of His Information, 36 Va. L. Rev. 61 (1950) 4

Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973 10

INTEREST OF THE *AMICI CURIAE*

Amici are publishers, broadcasters, cable networks and organizations of journalists and publishers.[1] In the last two years at least a dozen journalists employed by many of these *amici* have been held in contempt or placed at risk of contempt simply for honoring what they understand to be their professional ethical obligations to their sources. The penalties imposed in recent months on the Petitioners and other journalists dwarf any others in American history. Absent clarification of the applicable law by this Court, the decision below threatens to make compelled disclosure of journalists' confidential sources the norm rather than the rare exception. For this reason alone, the Court should grant *certiorari* and address directly the extent to which the First Amendment and federal common law preclude the compelled disclosure from journalists of the identities of those who seek to disseminate information to the public anonymously.

SUMMARY OF ARGUMENT

1. These cases deserve the attention of this Court because reporters across the country currently face a wave of federal subpoenas demanding the disclosure of their confidential sources and these subpoenas are being enforced through punitive measures of unparalleled severity. The press regularly depends on sources who will speak only on the condition of anonymity. The uncertainty fueled by the decision below renders it much more difficult for any

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[1] A complete list of the *amici* is set out in Appendix A ("App.") to this brief. Citations to the Appendix in the court of appeals are designated "A." Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

reporter to make a credible pledge of confidentiality and threatens to restrict the flow of important information to the public. This Court's intervention is urgently needed to clarify the extent to which reporters can make a promise of confidentiality that will be respected by the federal judiciary, as it routinely is in state courts.

2. The court of appeals' refusal in this case to recognize *any* First Amendment protection for a reporter's commitment to an anonymous source once a grand jury is convened cannot be squared with this Court's jurisprudence affording First Amendment protection to anonymous speech. As the Court has recognized, the First Amendment properly limits government's ability to coerce the disclosure of the identity of anonymous speakers because, without some constitutional protection, a significant amount of protected speech will inevitably be lost to the public. The decision below construes this Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in a manner that conflicts with the Court's decisions affording constitutional protection to anonymous speech, decisions that are expressly based on the historic role the press has played in safeguarding the anonymous speaker. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

ARGUMENT

I. THE DECISION BELOW RAISES AN ISSUE OF CENTRAL IMPORTANCE TO THE OPERATION OF A FREE PRESS

A. The Number of Federal Subpoenas Demanding Disclosure of Reporters' Sources Has Reached Unprecedented Levels

For more than twenty-five years following this Court's decision in *Branzburg*, subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources

were rare. *Amici* are not aware of any journalist who was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed dramatically. An unusually large number of subpoenas seeking the names of anonymous sources has been issued by federal courts in a remarkably short period of time, many to these *amici* and the journalists they employ. Indeed, just three matters in Washington, D.C. have recently generated subpoenas to roughly two dozen reporters and news organizations seeking confidential sources, seven of whom have already been held in contempt in less than a year. [2]

The decision below reflects this new willingness by some federal courts to enforce such subpoenas and impose severe sanctions against journalists. In fact, *amici* are aware of only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and both quashed the subpoenas. *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982).

Yet since 2000, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each time imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.[3] In

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[2] By way of comparison, the last significant survey of news organizations conducted in 2001 by *amicus* Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential source identities issued from any judicial or administrative body that year, federal or state. *See* www.rcfp.org/agents/material.html (last visited May 13, 2005).

[3] On those relatively rare occasions in the past when courts did hold reporters in contempt for declining to reveal sources, penalties were

2001, free-lance writer Vanessa Leggett served nearly six months in prison for declining to reveal sources of information related to a notorious murder, almost four times longer than any prison term previously imposed on any reporter by any federal court. *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam). Earlier this year, James Taricani, a reporter for WJAR-TV in Rhode Island, completed a four-month sentence of home confinement for declining to reveal who leaked a videotape capturing alleged corruption by public officials in Providence. *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). And the decision below ordering two reporters to prison for up to eighteen months, if allowed to stand, would result in the most severe contempt penalty ever imposed by an American court on a journalist for refusing to disclose a confidential source.

Decisions such as these have encouraged private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in similarly unprecedented fashion. In one pending civil suit, five reporters employed by *The New York Times*, *Los Angeles Times*, *Associated Press* and *CNN* have been held in contempt and subjected to fines of $500 per day each for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who claims such information was provided to them by government agents in violation of the

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largely symbolic. One commentator surveying early cases noted "a certain judicial reluctance to hold the newsman in contempt where this eventuality can conveniently be avoided." Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 74 (1950). The longest sentence previously known to have been served by a reporter for refusing to reveal a source was 46 days in a case arising shortly after *Branzburg*. *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); www.rcfp.org/jail.html (*Los Angeles Herald-Examiner* reporter William Farr).

Privacy Act. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). Contempt proceedings are currently pending against a sixth reporter in the same case. The six reporters include three Pulitzer Prize winners. The district court in the *Lee* case has expressly left open the possibility of additional, more severe sanctions if its contempt orders are affirmed on appeal. *See Lee*, 327 F. Supp. 2d at 33. And, in the wake of the success of Dr. Lee and the Respondent in this case, the plaintiff in another civil suit alleging violations of the Privacy Act, Dr. Steven Hatfill, issued subpoenas to a dozen news organizations seeking to compel an even larger number of reporters to disclose the identities of their confidential sources.[4]

Today, reporters and their potential sources operate in a far more uncertain and risky environment as a result of the approach to the reporters' privilege taken by the federal courts in all of these cases, most especially in the decision below. *Amici* journalists and news organizations currently face a realistic prospect of substantial prison terms and escalating fines for honoring promises to sources that in the past could confidently be made without fear of sanction.

B. Confidential Sources Are Often Essential to Informing the Public About Matters of Vital Concern

At bottom, the decision below warrants review because the uncertainty it has engendered threatens to jeopardize the flow of information to the public. The press "serves and was designed to serve [by the Founding Fathers] as a powerful

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[4] *Special Report: Reporters and Federal Subpoenas*, Reporters Comm. for Freedom of the Press, www.rcfp.org/shields_and_subpoenas.html (last visited May 13, 2005).

antidote to any abuses of power by governmental officials." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press cannot effectively perform this constitutionally recognized role without the ability to maintain the confidentiality of those sources who will speak only on a promise of anonymity. Unless this Court acts, the public's ability to receive information about its government through the press will be substantially impaired.

There can be no genuine dispute that journalists regularly depend on anonymous sources to report stories about the operation of government and other matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in part on anonymous sources.[5] While there is healthy debate within the journalism profession about the appropriate uses of anonymous sources, all sides of that debate agree that confidential sources are at times essential to effective news reporting.[6]

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern.[7] As WJAR reporter James Taricani testified before being sentenced to house arrest:

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[5] *See generally State of the News Media 2005*, www.stateofthemedia.org /2005/index.asp (last visited May 13, 2005).

[6] *See generally Reporters and Confidential News Sources Survey 2004*, www.firstamendmentcenter.org/news.aspx?id=14922 (last visited May 13, 2005).

[7] Attached to this brief as Appendix B is a compendium of affidavits recently submitted to federal courts by journalists employed by these *amici* documenting the indispensable role played by confidential sources in their reporting about public matters.

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.

App. at B40 ¶5. Indeed, Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president. *Id.* ¶¶ 6-8.

Pierre Thomas, recently held in contempt in the *Wen Ho Lee* case, recounted many similar examples in his testimony in that litigation. Information received from confidential sources enabled Mr. Thomas to report on the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles." *Id.* at B22 ¶ 14(b).

Confidential sources are not only critical to investigative journalists like Messrs. Taricani and Thomas, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. A. at 38,

¶ 5 (testimony of Jack Nelson, former *Los Angeles Times* Washington bureau chief, explaining the crucial role that confidential sources played in his reporting through the administrations of six Presidents). Without the ability to speak off the record to sources in the government who are not officially authorized to speak, reporters would be relegated to spoon feeding the public with little more than the "official" statements of public relations officers. *Id.* at 49, ¶ 12 (testimony of Scott Armstrong). For this reason, among others, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[8] and the coveted Pulitzer Prize.[9]

Indeed, journalistic experience confirms that, in many circumstances, important information is provided to the press in confidence precisely because the government has taken steps to conceal it by making its unauthorized disclosure

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[8] This year, the Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. *See* www.brooklyn.liu.edu/polk/polk04.html (listing awards).

[9] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of *The Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* www.pulitzer.org/year/2002/national-reporting. The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

unlawful. Standing alone, that latter fact cannot be sufficient justification to conclude, as did the court below, that no First Amendment or other public interest is served in allowing reporters to protect the anonymity of such sources. In the area of national security reporting, for example, journalists and public officials alike have come to recognize that "virtually everything is classified" so that verification of "something as mundane as a press briefing involves talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so." *Id.* at 50, ¶ 13. As a result, most high-level government officials serve as confidential sources at one time or another, in "an untidy but well-established accommodation" that functions as a safety valve allowing vitally important information to be transmitted to the public notwithstanding formal secrecy restrictions. *Id.* at 50, 53, ¶¶ 13, 19.[10]

The information anonymous sources make available to the public through the press is vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. Among the many compelling examples of valuable journalism that would never have been possible if a reporter could not credibly have pledged confidentiality to a source are the following:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). In

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[10] A survey conducted during the Reagan administration by Harvard University of 483 senior government officials (including two former secretaries of state) found that forty-two percent of the responding officials felt it appropriate to provide information to the press in confidence. *See* Jim Anderson, *Washington News*, UNITED PRESS INTERNATIONAL, Oct. 27, 1986.

refusing to enjoin publication of the leaked information, members of this Court recognized that the newspapers' sources may well have broken the law, *id.* at 754 (Harlan, J., dissenting), and they were in fact prosecuted, albeit unsuccessfully, after later coming forward. *See* Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1. Nevertheless, "[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do," *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring), and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.[11]

Neutron Bomb – Journalist Walter Pincus relied on anonymous sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[12] The public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[13] Mr. Pincus,

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[11] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

[12] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[13] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

who never received a subpoena concerning the neutron bomb or any other matter in his decades-long career, has recently received *two*—one from Respondent and one in the *Lee* case.

Fertility Fraud – In 1996, the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.[14] The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.[15] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action.[16]

Enron – In a groundbreaking series of articles published in 2001, the *Wall Street Journal* relied on confidential sources and leaked corporate documents to reveal the illegal accounting practices of a company that had "routinely made published lists of the most-admired and innovative

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[14] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1.

[15] Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

[16] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

companies in America."[17] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[18]

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[19] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[20] CBS and Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[21]

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[17] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[18] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[19] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

[20] Hersh, *supra* note 19.

[21] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at 1A (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

BALCO – In 2004, the *San Francisco Chronicle* published details of grand jury testimony given by some of the most prominent athletes in professional sports, part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports.[22] Baseball players Barry Bonds and Jason Giambi and other prominent athletes testified before the federal grand jury investigating the distribution of undetectable steroids by the Bay Area Laboratory Cooperative ("BALCO"). In some instances, their testimony was squarely at odds with their public denial of steroid use.[23] While the *Chronicle's* sources may have violated grand jury secrecy rules, the newspaper's reporting led to congressional hearings on steroid use in Major League Baseball as well as a decision by its Commissioner to tighten rules regarding the use of banned substances.

The decision below plainly threatens this kind of journalism. The compelled disclosure of the sources that enabled the press to report these stories "undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing." A. at 39, ¶ 7. As has been explained by *New York Times* reporter Jeff Gerth, another Pulitzer Prize-winning reporter who has recently been held in contempt by a federal court:

> Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain

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[22] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

[23] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004, at A1.

> cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality. . . .

App. at B37 ¶ 15. *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, also now in contempt of a federal court, similarly expressed this undeniable truth during his deposition in the *Lee* litigation:

> I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist.[24]

Especially in the wake of the court of appeals' decision in this case, the Court's guidance is essential to preserve the ability of the American press to engage in this kind of reporting that would be impossible if journalists were powerless to make commitments of confidentiality in appropriate circumstances. *Amici* respectfully submit that a

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[24] Dep. of R. Drogin, *Lee v. U.S. Dep't of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9. In an affidavit submitted in that same proceeding, Mr. Drogin recounted his necessary reliance on confidential sources to report about such matters as Saddam Hussein's efforts to circumvent U.N. sanctions, the failure of U.S. weapons inspectors to find post-war evidence of weapons of mass destruction, and the extent of North Korea's nuclear ambitions. App. at B2-B5 ¶¶ 3-4.

compilation of those serious crimes that have in fact gone unresolved because a journalist was permitted to protect his source would be a very short list indeed and would pale in comparison to the scores of news reports containing valuable information gleaned from confidential sources. Thus, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PROTECTION OF ANONYMOUS SPEECH AND THE HISTORICAL TRADITION ON WHICH THAT PROTECTION IS PREMISED

Notwithstanding the overwhelming evidence that confidential sources are essential to effective news reporting, the court of appeals read this Court's decision in *Branzburg* as holding that the First Amendment is simply irrelevant when a grand jury demands identification of a reporter's confidential sources. Petitioners persuasively demonstrate that the court of appeals' construction of *Branzburg* is at odds with the decisions of several of its sister circuits, and our purpose is not to repeat those arguments here. From the perspective of these *amici*, the overarching point is that the court of appeals' conclusion cannot be squared with this nation's historic tradition of protecting outlets for anonymous speech. The First Amendment's protection of such expression is grounded firmly in the experience of the Colonial-era press, which fought valiantly to protect the anonymity of those who often spoke through its pages. Everything this Court has said about the protection of anonymous speech under the First Amendment, in every other context and particularly in several post-*Branzburg* decisions, supports the journalistic experience described

above and is inconsistent with the court of appeals' interpretation of *Branzburg* in this case.

In a variety of decisions addressing anonymous speech outside the context of the reporters' privilege, this Court has emphasized that the right to speak to the public anonymously is protected by the First Amendment in significant part because, when the Bill of Rights was enacted, the Founders understood the importance of such speech to maintaining an informed citizenry. In *Talley v. California*, this Court expressly recognized that the First Amendment was enacted in significant part to ensure that printers, the "press" of their day, could not be compelled by the government to reveal the identities of those authors whose works they had agreed to disseminate anonymously:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

362 U.S. 60, 64-65 (1960).

More recently, in his concurring opinion in *McIntyre*, Justice Thomas described the experience of the eighteenth century "news media," which then consisted largely of journals that were really collections of contributions from individual authors. Those authors not infrequently requested anonymity and their identities were therefore known only to the printers, who fought to honor the promises of confidentiality they had made against efforts by colonial authorities to compel the disclosure of their authors' identities. *McIntyre*, 514 U.S. at 360 (Thomas, J.,

concurring). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *Id.* at 361.

Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

While journalism has changed dramatically since the late eighteenth century, today's reporters, publishers and broadcasters perform essentially the same function as their Colonial-era predecessors: exercising their editorial judgment to enable some anonymous sources of information and opinion to reach a broad audience. Indeed, when newspaper editor Isaac Collins refused to comply with the New Jersey Legislature's demands discussed above on the grounds that to testify would "'betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press,'" he articulated exactly the same reasons why

Petitioners and other journalists employed by many of these *amici* have respectfully declined to comply with the subpoenas served on them. *Id.* at 362 (citation omitted).

The enduring lessons this Court has drawn from history validate *amici*'s showing that important information will be lost to the public if journalists cannot reliably promise anonymity to sources. The underlying rationale permeating almost all of this Court's decisions protecting the right to speak anonymously is that without effective legal protection of that right, would-be speakers will remain silent and a significant amount of important speech will be lost. Thus, in *Talley*, this Court invalidated an ordinance requiring that leaflets identify an author on the grounds that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 65. In *McIntyre*, the Court recognized that election workers may well decide to remain anonymous out of "fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 514 U.S. at 341-42.[25] The same logic applies to those anonymous sources who turn to journalists as their conduit to the public. Indeed, two centuries of evidence and

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[25] *See also Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002). Communications between a journalist and a source are far more analogous to the personal leafleting and canvassing at issue in *Talley*, *McIntyre* and *Watchtower* than to the campaign finance disclosure provisions approved in both *McConnell v. FEC*, 540 U.S. 93 (2003), and *Buckley v. Valeo*, 424 U.S. 1 (1976), on the grounds that they deter systemic political corruption. In fact, even in the campaign finance context, exceptions to the constitutionality of compelled disclosure provisions have been recognized where there is a "'reasonable probability'" that disclosure would subject an individual wishing to remain anonymous to "'threats, harassment or reprisals.'" *McConnell*, 540 U.S. at 198 (citation omitted). Both history and the experience of journalists demonstrate that is precisely why reporters' sources request anonymity.

experience effectively answer *Branzburg*'s query about whether any "significant constriction of the flow of news to the public" would result from compelling journalists to divulge the names of their sources. 408 U.S. at 693.

Finally, the lessons of history after the Revolutionary era underscore why journalists find themselves at a crossroads at this moment, and why it is therefore important for this Court to review and resolve, once and for all, this issue of obvious public importance. While we are not aware of any specific surveys on the topic, what evidence exists strongly suggests that, apart from an historical exception or two that actually proves the rule, the criminal justice system has for the most part voluntarily left journalists alone. There appear to be no reported judicial decisions addressing subpoenas to reporters until roughly the beginning of the twentieth century. Only roughly a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. *See id.* at 685-86 (citing cases).[26] And, as the Petitioners have explained, during those brief, exceptional periods when subpoenas were issued to reporters in significant numbers, most notably in the years immediately surrounding this Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. History thus demonstrates that both "reason and experience" support the same result as a matter of federal common law. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

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[26] Indeed, prior to the late 1960s, we are aware of only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds unrelated to privilege. *See Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant).

The recent surge in the number of subpoenas, the dramatic increase in the severity of contempt penalties, the startling pronouncement by the court of appeals in this case that the First Amendment has no bearing on the issue and its inability to agree whether federal common law even speaks to the question all stand in marked contrast to this nation's historic tradition of respecting both the right to speak anonymously in general and the ability of the press to act as a conduit for such anonymous speech in particular. If the Court does not seize this opportunity to address this vital issue, other courts will surely follow the lead of the D.C. Circuit and these trends will only accelerate in a manner that will fundamentally impact the ability of the American public to receive information about the operation of its government and the state of the world in which we live.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petitions for *certiorari*.

Respectfully submitted,

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APPENDIX A

ABC, Inc., alone and through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20* and *Nightline*. ABC received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Advance Publications, Inc. is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. It also, directly or through subsidiaries, owns The Conde Nast Publications, Fairchild Publications, Inc., Parade Publications, and the Golf Digest Companies, which together publish over 25 magazines with nationwide circulation.

The Associated Press is a not-for-profit mutual news cooperative. The members of AP are more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1848, AP is now the largest newsgathering organization in the world. AP received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill and AP reporter Josef Hebert has been held in contempt and fined $500 per day for declining to reveal confidential sources of information about Dr. Wen Ho Lee, who is also suing the government for alleged violations of the Privacy Act. Those fines have been stayed pending appeal.

The Association of American Publishers, Inc. is the principal trade association for the U.S. book publishing industry with over 300 members, comprising most of the

major commercial book publishers in the United States, as well as smaller and medium-sized houses, non-profit publishers, university presses and scholarly societies.

Cable News Network LP, LLLP ("CNN") is a subsidiary of Turner Broadcasting System, Inc., a Time Warner company. CNN is the world's largest news organization with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the world. Former CNN reporter Pierre Thomas has been held in contempt and fined $500 per day for declining to reveal confidential sources of information about Dr. Wen Ho Lee. Those fines have been stayed pending appeal. CNN also received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

CBS Broadcasting Inc., a wholly owned subsidiary of Viacom Inc., produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine programs such as *60 Minutes* and *48 Hours Investigates*. CBS owns and operates broadcast television stations nationwide and, through another Viacom subsidiary, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country. CBS received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Dow Jones & Company, Inc. is the publisher of, *inter alia*, *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, a news site on the world wide web with over 700,000 paying subscribers; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper

of business and finance; and, through Ottaway Newspapers, Inc., its subsidiary, more than twenty daily and weekly newspapers.

DR Partners d/b/a Stephens Media Group is a nationwide newspaper company, which publishes daily and weekly newspapers in eight states from North Carolina to Hawaii, including the *Las Vegas (NV) Review-Journal*, the largest daily newspaper in Nevada.

Gannett Co., Inc. is an international news and information company that publishes 101 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including *USA TODAY*, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 22.7 million. Gannett's 21 television stations cover 17.9 percent of the United States. Gannett received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Gray Television, Inc. is a communications company headquartered in Atlanta, Georgia, which operates 16 CBS-affiliated television stations, eight NBC-affiliated television stations, seven ABC-affiliated television stations and five daily newspapers.

Gruner + Jahr USA Publishing reaches one of the largest readerships in America, selling nearly 200 million magazines each year. Gruner + Jahr USA Publishing's six core titles – *Child*, *Family Circle*, *Fast Company*, *Fitness*, *Inc.* and *Parents* – are leaders in the business, fitness, parents and women's service markets. Beyond its core titles, Gruner + Jahr USA Publishing also reaches consumers through the Parents Media Group, books and licensing, custom publishing and new media divisions.

The Hearst Corporation is a diversified, privately held media company that publishes consumer magazines, business publications and newspapers, including the *Houston Chronicle*, the *San Francisco Chronicle* and the *Seattle Post-Intelligencer*. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television and is the majority owner of Hearst-Argyle Television, Inc., which owns and operates numerous broadcast stations. Federal prosecutors have requested that the *San Francisco Chronicle* reveal the source of information provided to it regarding the grand jury investigation of the distribution of steroids by the Bay Area Laboratory Cooperative or "BALCO".

Landmark Communications, Inc. is a privately held media company with interests in newspapers, television broadcasting, cable programming and electronic publishing. Its newspapers include *The Virginian-Pilot*, the *Greensboro News & Record*, *The Roanoke Times* and more than one hundred community newspaper and special interest publications. Landmark Communications, Inc. owns television stations in Las Vegas (KLAS-TV) and Nashville (WTVF-TV), as well as the Weather Channel, which produces continuous, 24-hour national, regional and local weather-related programming received by more than 87 million households nationwide.

Magazine Publishers of America ("MPA") is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests,

avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

Media General, Inc. is a diversified communications company operating leading newspapers, television stations and online enterprises, primarily in the Southeastern United States. The company's publishing assets include three metropolitan newspapers, *The Tampa Tribune*, the *Richmond Times-Dispatch*, and the *Winston-Salem Journal*; 22 daily community newspapers in Virginia, North Carolina, Florida, Alabama and South Carolina; and more than 100 weekly newspapers and other publications. The company's broadcasting assets include 26 network-affiliated television stations that reach more than 30 percent of the television households in the Southeast.

The National Newspaper Association ("NNA") is the national voice of community newspapers, representing owners, publishers, and editors of America's community newspapers. The NNA has approximately 3,200 newspaper members.

National Public Radio, Inc. ("NPR") is a District of Columbia non-profit membership corporation. It produces and distributes its radio programming through, and provides trade association services to, nearly 800 public radio member stations located throughout the United States and in many U.S. territories. NPR's award-winning programs include *Morning Edition*, *All Things Considered*, and *Talk of the Nation* and serve a growing broadcast audience of over 23 million Americans weekly. NPR also distributes its broadcast programming online (adding additional reporting and features), to foreign countries through satellite and cable systems worldwide, and to U.S. Military installations via the American Forces Radio and Television Service. NPR

received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

NBC Universal is one of the world's leading media and entertainment companies. Formed in May 2004 through the combining of NBC and Vivendi Universal Entertainment, NBC Universal owns and operates the NBC television network, a Spanish-language network (Telemundo), NBC News, and several news and entertainment networks including MSNBC and CNBC. NBC News produces the *Today* show, *NBC Nightly News with Brian Williams*, *Dateline* and *Meet the Press*. NBC Universal also owns and operates 29 television stations, including WJAR in Rhode Island. WJAR reporter James Taricani recently served a four-month sentence of home confinement for declining to reveal who leaked to him a videotape capturing alleged corruption by local government officials. An NBC News reporter received a subpoena seeking confidential sources issued by the Respondent in this case and CNBC received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Newsweek, Inc., a wholly owned subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally. *Newsweek* received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Random House, Inc., the world's largest English-language general interest trade book publisher, is a division of Bertelsmann AG, one of the foremost international media companies in the world. Its more than 100 imprints in the U.S. and in sixteen countries globally publish some of the

most influential and popular fiction and nonfiction authors in hardcover, paperback, audio, and digital formats.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee provides representation, guidance, and research in First Amendment litigation. The Reporters Committee was founded in 1970 in response to a wave of government subpoenas directed at journalists.

The Society of Professional Journalists ("SPJ") is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

Tribune Company operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80 percent of U.S. households, and is the only media company with newspapers, television stations and web sites in the nation's top three markets. In publishing, Tribune operates 12 market-leading daily newspapers, including the *Baltimore Sun*, *Newsday*, the *Chicago Tribune*, and the *Los Angeles Times*. In broadcasting, Tribune properties include 26 television stations and Superstation WGN on national cable. Both the *Los Angeles Times* and a former *Baltimore Sun* reporter received subpoenas seeking their confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill and *Los Angeles Times* reporter Bob Drogin has been held in contempt and fined $500 per day for declining to

reveal confidential sources of information about Dr. Wen Ho Lee. Those fines have been stayed pending appeal.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 759,000 and a Sunday circulation of over 1.03 million. *Washington Post* reporter Walter Pincus received a subpoena seeking his confidential sources in the Privacy Act lawsuit instituted by Dr. Wen Ho Lee and two *Post* reporters, including Mr. Pincus, received subpoenas seeking their confidential sources issued by the Respondent in this case. The *Post* also received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE, Plaintiff, - against – UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	)	Civ. A. No. 99-3380 (TPJ)

AFFIDAVIT OF BOB DROGIN

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

BOB DROGIN, being duly sworn, states:

1. I submit this affidavit in response to the Court's Order to Show Cause. Except where otherwise stated, I have personal knowledge of the facts herein.

2. I have been a professional journalist for 28 years and have won numerous national awards for my work. Since

1998, I have covered national security, focusing on intelligence, in the Washington bureau of the *Los Angeles Times*. In the past year, my work has been cited in The New Yorker, the New York Review of Books, Columbia Journalism Review and by other news organizations. I was stationed overseas from 1989 to 1997, first as chief of the Manila bureau of the *Los Angeles Times* and then as chief of the paper's Johannesburg bureau. Prior to that, I spent six years as a national correspondent in the paper's New York bureau. I have also worked at the *Philadelphia Inquirer* and at the Charlotte (N.C.) *Observer*, where I helped lead a team of reporters who won the 1981 Pulitzer Prize for Meritorious Public Service for a series entitled "Brown Lung: A Case of Deadly Neglect."

3. Although I prefer to use on-the-record sources, as I believe most journalists do, throughout my career I have relied on confidential sources when necessary to provide important news to my readers, or to provide context for understanding events. Quite simply, I have found that the ability to promise sources confidentiality is often essential to gather and disseminate the news, especially when covering stories about sensitive topics such as foreign affairs, national security, and intelligence.

4. For example, I have relied heavily on confidential sources to cover intelligence and anti-terrorism initiatives since the attacks of Sept. 11, 2001:

a. On Sept. 12, 2001, I contributed to a story that preliminarily identified Osama bin Laden as the mastermind behind the devastating attacks on the World Trade Center and the Pentagon. The story, which contained details of the gathering investigation, relied heavily on well-placed sources within the intelligence community who spoke on the condition that neither I nor my colleagues reveal their identities. This article was published at a time when U.S.

officials were not prepared to assign responsibility for the attacks and when representatives of the Taliban government in Afghanistan were denying any involvement by bin Laden's Al Qaeda network. A copy of this story is attached hereto as Exhibit 1.

b. In the immediate aftermath of the terrorist attacks, confidential sources provided information about the CIA's rapid mobilization efforts with a "virtual blank check" from the Bush Administration, including initiatives to reassign and recall analysts and operatives, rebuild an Afghanistan network that had been largely dismantled following the Soviet withdrawal in 1989, form relationships with ethnic fighters in Afghanistan, and publicize a bounty on Osama bin Laden within Muslim communities. Another story that I co-authored in October 2001 described the extent to which the American intelligence community considered all options available to fight terrorism – including torture, assassination, and targeting civilians. As one confidential source, a former CIA official, told me, "there is a lot of experimentation that's going on." Copies of these stories are attached hereto as Exhibit 2.

c. A June 1, 2002, article that I co-authored reported that the CIA had by then paid tens of millions of dollars to informers in Afghanistan and Pakistan for intelligence about the whereabouts of bin Laden. Details about the cash payouts—which sometimes purchased unreliable or bogus information—came from confidential sources, who spoke on the condition that they not be identified by name. Were my colleague and I not able to promise those sources anonymity, we would not have been able to report fully on the methods being employed in the hunt for bin Laden. Copies of these stories are attached hereto as Exhibit 3.

d. A December 9, 2001 article relied on sources within the U.S. intelligence community to describe the

emerging picture about Al Qaeda terrorist cells in Indonesia, Yemen, and Somalia, as wells as little-noticed U.S. efforts in Bosnia-Herzegovina and the Philippines. Without information provided by these sources, we would not have been able to inform readers fully about the war being waged against terrorism across the globe. A copy of this story is attached hereto as Exhibit 4.

e. In August 2002, at a time when little information was available about the approximately 600 terrorism suspects from 43 countries then in U.S. custody at Guantanamo Bay, confidential intelligence sources revealed that none of the detainees were considered to be Al Qaeda leaders. Rather, the majority of the prisoners were regarded as "low and mid-level" fighters and supporters of the organization. A copy of this story is attached hereto as Exhibit 5.

f. Before ground troops began military action in Iraq, confidential sources provided information on how the Hussein regime's smuggling efforts circumvented U.N. sanctions to purchase military equipment such as night-vision devices, communications gear, and tires for armored personnel carriers. Following the war, a three-month investigation used numerous confidential sources and reviewed more than 800 pages of documents to conclude that this pipeline was broader than previously imagined, and that a Syrian trading company served as the main conduit for Iraq circumvention of the U.N. embargo. Copies of these stories are attached hereto as Exhibit 6.

g. In January 2003, as the United States was building a case for a link between Al Qaeda and Saddam Hussein, confidential sources enabled a colleague and me to report that the Bush Administration's assertion relied on only circumstantial evidence and one Al Qaeda suspect. Indeed, intelligence officials told me that "[t]here isn't a factual basis for such assertions," thus raising serious doubts about one

justification for military action against Iraq. A copy of this story is attached hereto as Exhibit 7.

h. After the war, I reported on the disorganization, delays, and faulty intelligence that plagued searches for weapons of mass destruction, relying on confidential sources to describe the rocky start to weapons inspection. On August 28, 2003, I reported on the failure of U.S. investigators, after reviewing millions of pages of Iraqi government documents, to uncover evidence supporting pre-war claims that Saddam Hussein had secretly acquired chemical and biological weapons. This report relied extensively on sources within the 1,400-member Iraq Survey Group who spoke on the condition that I not disclose their names. Without the cooperation of these sources, I would not have been able to report this important [story]. Copies of these stories are attached as Exhibit 8.

i. On February 20, 2004, I co-wrote a report about the struggles of the CIA's operations in Iraq and Afghanistan. The story exposed many of the problems the agency was confronting in attempting to rebuild its clandestine intelligence service and, specifically, it revealed internal turmoil related to the leadership of the CIA's Baghdad station. The article depended substantially on the cooperation of sources within the agency who spoke on the condition that we not reveal their names. A copy of this story is attached as Exhibit 9.

j. Similarly, confidential sources later provided information fleshing out the intelligence community's faulty reliance on pre-war claims made by an Iraqi defector, later discredited, about Iraq's weapons program. This provided our readers with important information about the evidence supporting pre-war claims by the Bush Administration and Congress to justify U.S. military action in Iraq. Copies of these stories are attached hereto as Exhibit 10.

5. U.S. and foreign government officials often provide context for international political developments and national security issues on condition that they not be identified. Many of these events would not have been reported to my readers – or reported in significantly less detail – without these sources. Some examples from my past reporting include:

a. Information provided by confidential sources within the U.S. intelligence community were central to a Jan. 5, 2003 profile of a metallurgist considered to be the father of Pakistan's nuclear bomb, describing the possible links to nuclear programs in North Korea, Iran, and Iraq. My coverage of U.S. Pakistani political tensions related to Pakistan's nuclear program goes back at least a decade. For example, relying largely on interviews with a "senior Pakistani intelligence official" and with diplomats, all of whom would speak with me only on condition of anonymity, in an April 9, 1993 report I explained to my readers the newly strained relationship between Pakistan and the United States. Without these confidential sources, I would not have been able to provide context for the apparent contradiction of U.S. economic sanctions and threats against Pakistan, at the same time as we continued high-level diplomatic and military visits. Copies of these stories are attached as Exhibit 11.

c. [sic] Confidential sources substantially advanced my reporting on an attempted 1989 military uprising in the Philippines. In a Dec. 12, 1989 story, in particular, such sources revealed that the United States and other Western nations ignored intelligence warnings about a coup attempt that nearly toppled President Corazon Aquino's government. Prior to military action, rebels had sought through back channels Western support for the uprising. This caused the CIA and foreign intelligence agencies to re-examine their procedures. A copy of this story is attached hereto as Exhibit 12.

d. In covering the aftermath of the Gulf War in 1991, I relied significantly on confidential sources, at least in my initial stories, to report on widespread reprisal killings in newly liberated Kuwait. For example, I relied on a "senior Western official" to confirm reports that Kuwaiti military were attacking or detaining Palestinians for a March 14, 1991 article. Copies of these stories are attached hereto as Exhibit 13.

e. On May 10, 1999, I co-wrote a story on the mistaken bombing of the Chinese embassy in Belgrade by a U.S. warplane. Based in part on a confidential source, we reported that officials at the CIA had chosen the target mistakenly and that the target subsequently had been vetted by military strategists, thus revealing a significant deficiency in war-planning procedures. A copy of this story is attached hereto as Exhibit 14.

f. During negotiations between the United States and North Korea over the North Korean nuclear program negotiators, U.S. officials privately explained the status of talks – and information about the extent and purpose of that nation's program – in much greater detail than in official statements. Copies of these stories are attached hereto as Exhibit 15.

g. Similarly, U.S. officials spoke on condition of confidentiality in December 2001 about escalating tensions between India and Pakistan, providing intelligence analysis about the extent of military buildup along the border and the prospects for military action. Without these sources, readers would have had significantly less information about a possible war between two nuclear powers. A copy of this story is attached hereto as Exhibit 16.

6. I was assigned to report about the investigation into allegations that China had obtained U.S. nuclear secrets, including allegations against Wen Ho Lee, because the story

concerned national security issues. My approach to reporting this story, including any use of confidential sources, was consistent with the way I have practiced journalism as a foreign and national security correspondent throughout my career.

7. Based on my personal experience during my many years as a professional journalist, I firmly believe that if sources who would otherwise be willing to speak to me in confidence viewed me as an investigative tool of private litigants, unable to keep their identities confidential as promised, they would, in many cases, not be willing to provide newsworthy information for dissemination to my readers.

/s/

_____

Bob Drogin

Sworn to before me this
30th day of July, 2004

/s/

_____

Notary Public

B9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE,	)	
Plaintiff,	)	
	)	Civ. A. No.
	)	99-3380 (TPJ)
- against -	)	
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, and UNITED STATES DEPARTMENT OF ENERGY,	)	
Defendants.	)	

AFFIDAVIT OF H. JOSEF HEBERT

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

H. JOSEF HEBERT, being duly sworn, states:

1. I submit this affidavit in response to the Court's Order to Show Cause. Except where otherwise stated, I have personal knowledge of the facts herein.

2. I have been a reporter for The Associated Press ("A.P.") for 34 years. Prior to joining the A.P., I earned my journalism degree from the University of Missouri in 1967, and worked briefly for United Press International in Kansas

City before serving for two years on active duty in the U.S. Army, including a year in Vietnam as an information officer for an infantry division.

3. After joining the Chicago bureau of the A.P. in 1970, I spent time in the A.P.'s Springfield, Ill., New York, and Concord, N.H., bureaus and was promoted to the flagship A.P. bureau in Washington, D.C., in 1977. For most of the past 27 years, I have been a "beat" reporter focusing on environmental, energy, transportation, and nuclear issues.

4. For example, I was one of the A.P. reporters who reported about the Three Mile Island nuclear accident in 1979 and the ensuing investigation by a presidential commission. In 1981, I covered the air-traffic controllers' strike. I followed airline deregulation and wrote about nearly every major aircraft accident in the 1980s. Beginning around 1990, I began reporting exclusively about environmental, energy, and natural resources issues. In 1997, I covered the climate change negotiations in Kyoto, Japan. On these issues, my beat has included Congress, the White House, and federal agencies such as the Energy Department.

5. Although I am not primarily an investigative reporter, like some of the other reporters subpoenaed in this case, throughout my long career as a Washington journalist I have regularly consulted officials on condition of anonymity. This is part of working a beat and occurs in a variety of contexts.

a. At one end of the spectrum, many parts of the federal government officially sanction "background" briefings, at which federal employees who may not have authority to speak to the press on the record provide information about specific topics on the condition that they not be named, or that they be identified only by specific terms, such as "a senior U.S. official." These briefings allow me and other journalists to inform readers of important news. If I refused to abide by the ground rules of such briefings, the

A.P.'s readers would not have access to the news generated at them.

b. Additionally, other news reporters and I frequently use confidential sources to confirm the accuracy of, or provide context to, breaking news developments. Through such relationships with reliable, confidential government sources, whose supervisors may or may not be aware of their contact with the press, I am able to flesh out official announcements, confirm or debunk other news reports, and play "catch up" in following stories that have been broken elsewhere. Officials typically provide confirmation and context to breaking news only upon being promised confidentiality. As a result, confidential sources make my stories more thorough and accurate.

6. Of course, some confidential sources genuinely "leak" information that has not previously been publicly disclosed. I believe that many people, upon hearing the phrase, "confidential source," think of these "Deep Throat" sources. But beat reporters in Washington, D.C., know such sources are rare. Much more important, on a day-to-day basis, are those trusted officials who provide confirmation and background details to news developments. These contacts are especially important at a wire service such as the A.P., because the A.P. must report news very quickly and every minute counts for a reporter following breaking developments. As conscientious journalists, we do not want merely to pass on official government communications to the press, or stories reported elsewhere in the media. Rather, we strive to make efforts to confirm independently the accuracy of what we learn and provide as much context as possible for readers.

7. Over the previous five years, confidential sources revealed or confirmed numerous facts that became central to my A.P. news stories. Some examples include:

- In at least two incidents at U.S. nuclear power plants, rules designed to prevent an unplanned nuclear chain reaction failed. Although the fact of an accident at a U.S.-operated fuel plant in Japan was public, I relied on confidential sources to explain the worker and system errors that caused a nuclear chain reaction. A copy of this story is attached hereto as Exhibit 1.

- In early 2001, the Bush administration planned deep cuts in programs aimed at helping Russia safeguard its nuclear materials. Sources who spoke on condition of anonymity discussed with me the dispute between Energy Secretary Spencer Abraham and the White House over funding for Russian nonproliferation programs. A copy of this story is attached hereto as Exhibit 2.

- Midwestern utilities lobbied to delay the implementation of smog-reducing regulations, according to sources who also revealed that one utility lobbying the White House claimed that a delay would save it $100 million in compliance costs. A copy of this story is attached hereto as Exhibit 3.

- Following Sept. 11, 2001, sources who spoke on condition of anonymity informed me that the Bush administration prepared to acquire 70 million barrels of oil for the government's emergency reserve. A copy of this story is attached hereto as Exhibit 4.

- FBI officials were telling energy companies in late 2001 that intelligence revealed Osama bin Laden had conditionally approved attacks on North American natural gas pipelines and facilities,

according to confidential sources. Subsequently, Attorney General John Ashcroft confirmed the warning. In January 2002, confidential sources confirmed for me that U.S. nuclear power plants were a target for al-Qaida airline attacks. Copies of these stories are attached hereto as Exhibit 5.

- Confidential sources proved essential to my coverage of the status of closed-door negotiations on a comprehensive energy bill in late 2003. For example, in a November 24, 2003 article, I relied on officials speaking on condition of confidentiality to report that the Bush administration, eager to broker a deal, was pressuring Republican leaders to drop liability protections for makers of a gasoline additive. A copy of this story is attached hereto as Exhibit 6.

- In a story about North Korea's restarting of a nuclear reactor, sources speaking on condition of anonymity provided information to me that there was no evidence that North Korea had yet begun processing plutonium to construct nuclear warheads. A copy of this story is attached hereto as Exhibit 7.

8. I came to report about Wen Ho Lee and allegations that U.S. nuclear secrets had been surreptitiously obtained by China as a breaking news story, the same way I have reported numerous stories in my career. I first [started] working on the story on March 8, 1999, when the Department of Energy fired Dr. Lee and issued a press release outlining many of the relevant details. I tried to confirm and explain the information the Energy Department had released and other media were already reporting, including Dr. Lee's name.

9. Based on my personal experience during my many years as a professional journalist, I believe that compelling me, or any journalist, to provide information about the identities of confidential sources will compromise my ability, and the ability of other journalists, to gather and report news and other matters of public concern. Many of my sources work in the government, and if they believed that my promises to keep their identities confidential might be compromised by the compelled disclosure, I would not be able to secure their cooperation and report newsworthy information to my readers provided by them in the future. The result would be not only less news, but less accurate news.

/s/

H. Josef Hebert

Sworn to before me this
28th day of July, 2004

/s/

Notary Public

B15

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE, Plaintiffs, - against – UNITED STATES DEPARTMENT OF JUSTICE, ET AL., Defendants.	)	Civ. A. No. 1:99-3380 (TPJ)

AFFIDAVIT OF PIERRE G. THOMAS

BEFORE ME, the undersigned authority appeared Pierre G. Thomas, who after first being duly sworn by me deposes and says:

1. I am over the age of 18 years and am qualified to make this affidavit under oath. Unless otherwise indicated, the statements in this affidavit are based upon my personal knowledge.

2. I am familiar with, but I am not a party to, this action. I submit this affidavit in response to this Court's Order to Show Cause, issued June 29, 2004, and to further demonstrate why I should not be held in contempt.

3. I have been employed as a professional journalist for twenty years. I graduated in 1984 from Virginia Polytechnic Institute and State University. I am a member of the National Association of Black Journalists.

4. I have been a national-affairs journalist for *The Washington Post*, Cable News Network ("CNN"), and currently, ABC News where I am the correspondent assigned to cover the United States Department of Justice. At all three news organizations, I have reported on numerous matters of public significance.

5. Much of my work as a professional journalist has concerned the Justice Department and other law enforcement agencies. I frequently report upon the mishandling of operations and investigations by Government agencies.

6. At all times relevant to this action, I was a CNN broadcast reporter. In my deposition in this matter, I was questioned about three 1999 news reports published on CNN's website concerning security problems at Los Alamos National Laboratory, two dated April 28, 1999, and one dated October 14, 1999.

7. I was not questioned about a number of other articles and broadcasts that I wrote or helped to write in the course of my reporting for CNN on the investigation and prosecution of Wen Ho Lee. In several of these, I focused on the shortcomings in the Government's case. Specifically:

- prior to any charges being filed against Dr. Lee, I reported on September 22, 1999 that the Government planned to expand its investigation after admitting that their initial focus on Dr. Lee was too narrow.
- I also reported on July 26, 1999 and September 22, 1999 (as well as on other dates) the opinions that Dr. Lee was targeted as a suspect because of his nationality and that likely he would never face espionage charges because the Government could not prove that he gave classified information to anyone.

- On the same day Dr. Lee was indicted, on December 10, 1999, I again reported that the Government's case had no evidence Dr. Lee gave tapes to anyone or that he had been in contact with any foreign government after the tapes disappeared.
- After the judge released Dr. Lee on bail, on August 25, 2000 and on August 29, 2000, I reported on an FBI agent who later admitted that testimony in connection with an earlier bail petition had misled the judge. Further, I reported that the government still lacked evidence that Dr. Lee gave the downloaded tapes to anyone.
- Finally, in September 2000, after Dr. Lee pled guilty and was released from prison, I reported on congressional and White House criticism of the government's investigation of Dr. Lee.

Copies of some of my reporting on the flaws in the government's case against Dr. Lee are attached as composite Exhibit A.

8. In reporting for news organizations, I have regularly found it necessary to rely upon information provided by people who agreed to speak with me only if I agreed to keep their identities confidential. In general, these sources extract this promise from me because their position in the Government or the private sector puts them at significant risk if they disclose the information they wish to provide to me, but they believe the public needs to know this information. In every case in which I have agreed to keep a source confidential, information of vital concern to the public otherwise would have remained shielded from the public's view.

9. The press is the conduit for the flow of information that enables the public to monitor its Government. The ability of journalists like me to promise confidentiality helps keep the flow of this type of information unobstructed. Otherwise, the information that flows to the public would in many cases be incomplete, biased, or stifled.

10. The exposure of ineffective or improper Government activities by my confidential sources has, on numerous occasions, led to changes in the law or Government policy in ways that are unequivocally positive for the citizenry.

11. (a) For example, in 1991 as a Staff Writer for *The Washington Post*, I was part of a team of journalists that became finalists for a Pulitzer Prize and was awarded on two different occasions the Morton Mintz Investigative Award for a series of articles about illegal gun-running in Washington, D.C. Gun-runners would pay straw purchasers – typically, needy or drug-addicted Virginia residents – to buy guns in Virginia. The gun-runners would then take delivery and sell the weapons in the District, where the purchase and importation of guns is illegal. The guns would turn up at crime scenes all over the District. The articles on which I worked focused on what little law enforcement was doing or could do to enforce existing laws in both jurisdictions.

(b) Many of these articles relied on information provided by confidential sources, including federal and state law enforcement officials. For example, confidential government sources identified for me loopholes in existing laws that allowed straw purchasers to buy guns undetected and demonstrated that many straw-purchasers were not prosecuted. If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles about the Government's failure to address a serious issue of personal safety.

(c) Fewer than six months after the publication of my first article, the Virginia Legislature began examining the problem of gunrunning. Not long thereafter, the Legislature passed tighter gun laws, including a one-gun-per-month limit on handgun purchases, to try to put a halt to the straw purchase schemes.

(d) Copies of selected articles that I wrote or helped to write concerning the illegal gun trade and Virginia's reaction to the problem are attached hereto as composite Exhibit B.

12. (a) In 1993, also while at *The Washington Post*, I authored several articles about the Government investigation into the Bureau of Alcohol, Tobacco and Firearms ("ATF")'s 1993 raid on the Branch Davidian compound in Waco, Texas. Four federal agents were killed and 16 others wounded during the raid. More than 80 Branch Davidians later died when the compound caught fire after the FBI injected tear gas inside. Much of the investigation concerned whether ATF proceeded with the raid despite bad intelligence, questionable tactics, and faulty decision-making. Then-ATF Director Stephen Higgins and several top-ranking officials were the focus.

(b) Many of these articles relied on information from confidential sources. Specifically, confidential Government sources questioned why ATF entered a heavily-armed compound in broad daylight. These sources revealed that Branch Davidian leader David Koresh knew the identity of a Government informant who had infiltrated the group, and that ATF commanders knew they had lost the element of surprise, but the raid nonetheless went forward. Confidential sources also revealed that the raid was planned less than a week before its execution, and the plan was not detailed in accordance with ATF guidelines. If I had no ability to promise confidentiality to these sources, they would not have

furnished vital information for these articles about the Government ineptitude that led to the deaths of its own employees and the people inside the Davidian compound.

(c) During the course of my reporting and that of others, an independent review panel concluded that ATF officials used a "pattern of deception" to try to conceal the problems with the raid, and that ATF knew that the Davidians learned of the mission prior to its launch, giving them time to prepare a counterattack. Director Higgins, and five senior officials, were removed from their jobs with the agency as a result.

(d) Copies of selected articles that I wrote or helped to write concerning the ATF raid at Waco and the ensuing investigation are attached hereto as composite Exhibit C.

13. (a) In 1995, in the wake of the bombing at the Alfred P. Murrah Federal Building in Oklahoma City that killed or injured more than 600 people, I wrote numerous articles for *The Washington Post* about the investigation into the identities of those responsible.

(b) Many of these articles relied heavily on confidential law enforcement officials. For example, some sources provided information that the Government quickly had ruled out a vast coordinated effort or wide-scale terrorist attack, while other sources questioned whether the prosecution had ruled out a broader conspiracy too soon and focused too narrowly on Timothy McVeigh and Terry Nichols. These sources indicated that there might have been several others involved in the bombing that the Government could not identify. If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles about the Government investigation to uncover and punish all of those responsible for the Oklahoma City bombing.

(c) My reporting and that of others was instrumental in helping a nervous public sort through the course of the Government investigation, overseeing what steps the Government was taking to bring those responsible to justice, how secure the public could be that the right people had been identified, and what efforts were being made to root out all of their accomplices.

(d) Copies of selected articles that I wrote or helped to write concerning the Government investigation in the aftermath of the Oklahoma City bombing are attached hereto as composite Exhibit D.

14. (a) Six years after Oklahoma City, when America experienced a large-scale terrorist attack, I was a reporter for ABC News. I along with my colleagues at ABC News received a Peabody Award for our coverage of the World Trade Center and Pentagon on September 11. Our efforts included coverage of the now infamous July 2001 "Phoenix Memo," an internal FBI warning memo about Islamic terrorists training at U.S. flight schools and the possible connection between these students and Osama Bin Laden. The memo, which went unheeded at the FBI, suggested a nationwide sweep of flight schools for possible terrorists. ABC News closely analyzed other pre-attack warnings as well.

(b) Many of the articles about the September 11, 2001 terrorist attack relied heavily on confidential Government sources. For example, confidential sources revealed that before the attack, FBI headquarters rewrote and weakened portions of an affidavit that the FBI's Minnesota field office had drafted in support of an application for a search warrant for records from Zacarias Moussaoui's computer. These sources complained the edits hindered the investigation after the application for the warrant was denied. Confidential government sources also revealed the National

Securitv Agency's failure to translate two intercepted Arabic telephone conversations the day before the attack which said "tomorrow is zero day" and "the match begins tomorrow." If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles about the Government investigation into what more might have been done to prevent the September 11 tragedy, and what may be done in the future to prevent it from happening again.

(c) My reporting, and that of my colleagues at ABC News, was instrumental in identifying and analyzing the uncoordinated manner in which federal law enforcement agencies received and processed intelligence information prior to the September 11. This reporting helped the public put into perspective the administration's creation of the Department of Homeland Security, one way in which the Government has attempted to improve, coordinate and consolidate functions of the federal agencies, in order to provide better intelligence.

(d) Copies of selected articles that I wrote or helped to write concerning the Government investigation into the September 11 attacks are attached hereto as composite Exhibit E.

15. In my deposition taken by Dr. Lee's lawyers in this matter, I tried to answer as truthfully and as fully as I could all questions that would not require me to breach promises I made to sources to keep their identities confidential. I engaged in far more discussion with Dr. Lee's counsel about my conversations with sources than I or most any other journalist would be comfortable doing. I did so to comply, as best I could without breaching my promises to sources, with the direction of this Court and with all due respect to Dr. Lee and his counsel.

16. I can provide no further information than that which I gave in my deposition without breaching promises to these sources. The promises were express conditions on which my interviews with these people were based. Had I not made the promises, these people would not have provided me the information. Further, if I were to breach my agreements with these sources, even under Court order, I could no longer function effectively and accurately in reporting on matters of public interest; as my reputation would become that of a journalist who might not keep his promise to a source.

17. For these reasons, more fully explained in the legal memorandum submitted on my behalf, I respectfully request that this Court find that I have shown sufficient cause why I should not be held in contempt of court.

FURTHER AFFIANT SAYETH NOT.

/s/
Pierre G. Thomas

DISTRICT OF COLUMBIA

The foregoing instrument was acknowledged before me this 27th day of July, 2004, by Pierre G. Thomas, who is personally known to me or has produced a driver's license as identification.

Notary Commission Expires:

07/27/04
Date

/s/
Signature

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE,	
Plaintiff,	
	Civ. A. No. 99-3380 (TPJ)
v.	
UNITED STATES DEPARTMENT OF JUSTICE, et al.,	
Defendants.	

DECLARATION OF WALTER PINCUS

I, Walter Pincus, hereby declare under the penalty of perjury as follows:

1. I am a staff writer for The Washington Post. In 1999, 2000 and 2001, I authored or co-authored nearly 100 news articles reporting on security concerns at the Los Alamos National laboratory. A small number of those articles concerned the investigation, firing, prosecution and conviction of Wen Ho Lee. I submit this declaration in opposition to Mr. Lee's motion to compel me to identify the confidential sources who provided me with information concerning him that was reported in those articles.

2. I have worked as a journalist almost continuously since graduating from Yale University in 1954 – for the New York Times, the Wall Street Journal, the Washington Star, the New Republic, NBC News, CBS News and, for 35 years, The Washington Post. While working as a journalist, I have

also studied law, receiving my J. D. degree from the Georgetown University Law Center in 2001, and taught seminars on the oversight of government at Yale University and Stanford University's Washington program. I have been a member of the Council on Foreign Relations for more than 30 years.

3. Much of my work in journalism has been in the field of intelligence and national security. My non-journalistic experience has been in those areas as well. From 1955 to 1957, I served in the U.S. Army Counterintelligence Corps. In 1962-63, I directed an investigation into foreign government lobbying for the Senate Foreign Relations Committee under its then Chairman, Senator J. William Fulbright. In 1969-70, I directed an investigation for the same Committee into U.S. military and security commitments abroad and their effect on U.S. foreign policy. Both investigations led to legislation – the first to a revision of the Foreign Agents Registration Act; the second to a series of limiting amendments on defense appropriations bills that culminated in the Hatfield-McGovern legislation to end the Vietnam War.

4. In my reporting for The Washington Post and other news organizations, I have regularly found it necessary to rely upon information provided by confidential sources – individuals who agreed to speak with me only after being assured that their identities would not be revealed. In general, those individuals were providing information about activities within government that they believed the public had a right to know. Sometimes that information provided evidence of wrongdoing; sometimes it revealed facts that were embarrassing to those in power; and sometimes it provided insights into how governmental decisions were made or how current events affected the public interest. In all of these cases, factual information that I believed was of

vital interest to the public would not have been published if I had not promised to maintain the confidentiality of those individuals who were in a position to disclose it. Some examples of my reporting that depended upon information from confidential sources are set forth below.

5. In 1977, I wrote the first stories about the neutron warhead. Copies of those stories are attached to this Declaration as Exhibit A. Those stories, for which I received the George Polk Award, depended in good part on information provided by confidential sources. Ultimately, President Carter decided to defer production of neutron missiles and artillery shells, because the publicity generated by the published stories created public opposition at home and in Europe against those weapons.

6. For six years I covered the Iran-Contra affair. Some of my stores are attached as Exhibit B. In the course of my reporting on this matter, I published once-classified information that was provided by confidential sources. For example, I wrote one of the first stories confirming that secret shipments of arms were sent to Iran to obtain release of hostages at a time when administration officials were refusing to confirm that fact. I used confidential sources within the executive branch and on Capitol Hill, as well as foreign officials and private individuals, all of whom needed to be assured their names and in some cases their employment would not appear. My reporting and that of other reporters were instrumental, I believe, in prompting the appointment of an independent counsel.

7. In 1992, I co-wrote stories on the Bush administration's reviewing Presidential-candidate Bill Clinton's passport files. See Exhibit C. Again, these stories relied upon information provided by confidential sources. And again, these and other stories ultimately led to the appointment of an independent counsel.

8. I covered the case of confessed-spy Aldrich H. Ames and its aftermath. See Exhibit D. Much of my analysis of the significance of this case was based upon interviews with confidential sources inside and outside government who were familiar with the investigation and prosecution of the case.

9. My recent reporting has focused on the intelligence community, Osama bin Laden, terrorism and the war in Iraq. In 2000, I was awarded the first Stewart Alsop award for national security and intelligence reporting by the Association of Foreign Intelligence Officers. Some of the stories that led to that award are attached as Exhibit E. Many of those stories relied upon information provided by confidential sources.

10. In 2001, I shared a Pulitzer Prize for National Reporting with four other Post reporters for our stories about Osama bin Laden. Copies of my stories are attached as Exhibit F. Confidential sources provided critical information that contributed greatly to the overall impact of those stories.

11. Since late 2002, I have been writing about the intelligence community, weapons of mass destruction and Iraq – including the United Nations inspections. Again, confidential sources both inside and outside the U.S. government have been the foundation for this reporting. Some stories illustrating this coverage, which have been submitted in Pulitzer Prize entries for 2003, are attached as Exhibit G.

12. In my current reporting on the intelligence community, the Bush administration, terrorism and the war in Iraq, I rely constantly upon factual information and observations provided by intelligence professionals and other government and congressional experts who will speak only upon the condition of complete anonymity. If I were to breach a promise of confidentiality to any of my confidential sources, or if in the future I were unable to assure anonymity

to sources, I would be unable to cover these areas accurately and effectively. Knowledgeable individuals would either not discuss matters or would only say what is already on the public record, whether it was accurate or not.

13. In this case, Wen Ho Lee seeks to identify the confidential sources who provided information to me, which I checked as best I could to confirm accuracy, concerning official investigations underway into allegations of espionage in the nation's nuclear weapons laboratories. Over time, some of these stories dealt with his firing, prosecution and conviction for mishandling classified information.

I began covering the subject of alleged espionage at the laboratories in late January 1999. On February 17, 1999, The Post published an article under my byline entitled "U.S. Cracking Down on Chinese Designs on Nuclear Data." See Exhibit H. The article reported that U.S. intelligence analysts in the mid-1990s had discovered that Chinese nuclear designs were "uncomfortably similar" to those of the U.S. Trident missile warhead. That discovery, I reported, had by 1997 prompted a major FBI counterespionage investigation and raised "concerns about curtailing the traditional openness within the country's nuclear scientific circles." The article disclosed that the FBI investigation had begun with employees at the Los Alamos laboratory, where the Trident warhead had been designed, and that more than a year earlier had "c[o]me to focus on an Asian American scientist at Los Alamos who had contacts with the Chinese and has since been transferred to a job outside the national security area." The article did not identify this individual, although it was later disclosed that he was Wen Ho Lee. This article was based in large measure on interviews with individuals who insisted on anonymity. The public interest was served, I believe, by the publication of this article, and it would have been impossible for me to collect and report the information

contained in this article if I had not promised anonymity to those sources.

14. On March 9, 1999, The Post published an article under my byline entitled "Spy Suspect Fired at Los Alamos Lab."[1] See Exhibit I. That article reported that "Energy Secretary William Richardson had fired a Los Alamos National Laboratory weapons designer yesterday who was under suspicion of handing nuclear secrets to China in the late 1980s." This and other information in the article was provided by confidential sources to whom I promised anonymity. I believe that this article, too, was in the public interest, and it could not have been written if I had not assured anonymity to my sources.

15. On November 20, 1999, The Post published an article entitled "Fired Lab Scientist Can't Account for Some Disks," under the joint byline of Vernon Loeb and me. See Exhibit L. The article reported: "Former Los Alamos scientist Wen Ho Lee has told government investigators that he cannot account for several computer diskettes onto which he downloaded nuclear secrets, according to Clinton administration officials." While much of the specific information contained in this article was provided by confidential sources, FBI Director Louis J. Freeh was identified as having said that he expected Lee to be indicted for gross negligence in handling classified information. Lee was subsequently indicted for mishandling classified

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[1] Between the publication of my February 17 article and my March 9 article, at least two other news organizations also published articles concerning Lee. On March 6, 1999, the New York Times published an article under the byline of James Risen and Jeff Gerth entitled "Breach at Los Alamos: A Special Report; China Stole Nuclear Secrets for Bombs, U.S. Aides Say." A copy of that article is attached hereto as Exhibit J. On March 8, 1999, the Associated Press published a story by H. Josef Hebert entitled "Government Scientist Involved in Probe is Fired." A copy of that article is attached hereto as Exhibit K.

information, and he pled guilty to this charge, a felony, based on the facts set forth in this article. Copies of the grand jury indictment, as well as the press releases of the FBI and U.S. Attorney's Office concerning the indictment, are attached hereto at Exhibit M.

16. As part of his plea agreement with the United States, Wen Ho Lee was required to subject himself to questioning concerning his handling of classified information. On February 4, 2001, The Post published an article under my byline entitled "Interrogation of Lee Raises New Questions, Sources Say." See Exhibit N. That article began as follows:

> The FBI and Justice Department prosecutors are considering seeking court approval to further question former Los Alamos scientist Wen Ho Lee under oath because they are not satisfied with the answers he gave during 60 hours of questioning last November and December, according to sources close to the investigation.
>
> During the interrogation by FBI agents, Lee's answers raised new questions about his relationships with nuclear scientists from China and Taiwan, the sources said. He also has yet to provide a verifiable explanation of why he downloaded U.S. nuclear secrets to portable computer tapes while working at the Los Alamos National Laboratory and what he did with the tapes, the sources said.

To my knowledge, Mr. Lee never provided a verifiable explanation of why he downloaded those nuclear secrets and what he did with the tapes. It was in the public interest, I believe, for those facts to be known. Those facts and other information in this article were provided by confidential

sources, both inside and outside government, who spoke to me only upon the assurance that I would not identify them.

17. Before asserting my First Amendment privilege not to identify my confidential sources in this case, I reviewed the Second Amended Complaint, which purports to state Mr. Lee's claims for violation of the Privacy Act. That complaint does not allege that any disclosure contained in any of my four articles involved any violation of the Privacy Act. The Complaint makes no mention whatsoever of the February 17 and November 20, 1999 articles and, as explained below, its brief references to my other articles do not appear to state any claim for violation of the Privacy Act.

18. The Second Amended Complaint contains a passing reference to the March 9, 1999 article – specifically, the statement, attributed to "an official familiar with the investigation," that "[w]e are still trying to pin down exactly when information was passed." I do not understand how that statement could implicate any violation of the Privacy Act. As I explained in my deposition, that was not a statement about Mr. Lee. It was not a statement, in other words, to the effect that the government was trying to pin down when information was passed by Mr. Lee. It was simply a statement that the government was trying to pin down when information was passed to the Chinese – by anyone.

19. The Second Amended Complaint contains a single reference to my February 4, 2001 article, alleging as follows:

> Citing government "sources close to the investigation," the article reveals selective details of information provided by Dr. Lee to Defendants during the secret debriefings. Moreover, an unnamed "government official" falsely depicted Dr. Lee's responses as "evasive, confusing, and

> frustrating for the people conducting the interview."

The interview referred to in this passage from the Complaint is the questioning that Mr. Lee was required to undergo as a condition of his guilty plea. At this point, he was a convicted felon fulfilling the requirements of his plea agreement. It is difficult to conceive of the privacy interest that Mr. Lee could claim in such an interview, much less how he can claim to have suffered compensable damage from the release of information contained in that interview. Although he complains of the characterization of his responses as "evasive, confusing, and frustrating," he does not attempt to state a claim for defamation, nor can I imagine how he could do so.

20. It would be a disturbing application of the Privacy Act, in my view, if it were applied to prohibit the kind of factual, newsworthy disclosures contained in my articles about the possible disclosure of nuclear secrets to China or Taiwan and the investigation and conviction of Mr. Lee for mishandling classified information entrusted to him. But whether or not the Privacy Act can be applied to such disclosures, it is apparent for the reasons stated above that my articles are not the basis for the Second Amended Complaint.

21. It is also apparent that, for the most part, Mr. Lee's attorneys have not inquired about my articles in the depositions they have taken in this case. Before I invoked my First Amendment privilege at my deposition, I read all 20 of the depositions of non-journalists in the case. Only four of those 20 witnesses were asked about the sources for my February 1999 article; only six were asked about the sources for my March 1999 article; only one was asked about the sources for my November 1999 article; and only one was asked about the sources for my February 2001 article. In

short, although Mr. Lee's counsel asked me to identify the sources for each of these stories, they did not make any systematic effort to ask the other witnesses in the case whether they were sources, or could identify the sources, for any of the information in my articles.

22. I cannot identify my confidential sources for these articles without violating commitments that I made to those individuals to maintain their anonymity. These commitments were a condition of my interviews with these individuals. If I had not promised them anonymity, they would not have provided the information I was able to report. If I were to breach my commitment to these sources, even under Court order, I could no longer function effectively and with accuracy in reporting on matters of intelligence and national security.

23. For these reasons, more fully explained in the legal memorandum submitted on my behalf, I respectfully request that the Court deny Mr. Lee's motion to compel.

I declare under the penalty of perjury, this 11th day of March 2004, that the foregoing is true and correct.

/s/

Walter Pincus

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE and SYLVIA LEE, Plaintiffs, - against – UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	Civ. A. No. 1:99-3380 (TPJ)

AFFIDAVIT OF JEFF GERTH

DISTRICT OF COLUMBIA: ss :

JEFF GERTH, being first duly sworn, deposes and says:

1. I am a reporter for The New York Times ("The Times") and have worked for The Times as a journalist for more than twenty-five years. I submit this affidavit in support of the motion to quash a subpoena directed at me.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. I have spent most of my career at The Times working as an investigative journalist on a wide variety of issues,

including organized crime, intelligence, government regulation, corporate affairs, and the financing of political candidates.

4. I have won numerous awards in connection with my investigative reporting. In 1999, I was awarded the Pulitzer Prize for my reporting about the transfer of American technology to China. This past year I shared the Pulitzer Prize along with other journalists at The Times for my coverage of the September 11, 2001 terrorist attacks. In 1981, I and two colleagues won the George Polk Award for my work concerning former United States intelligence agents working in Libya. In 1977, I and a colleague were awarded the Newspaper Guild's Front Page Award.

5. On March 6, 1999, The Times published an article written by my colleague James Risen and I entitled "Breach at Los Alamos, A special Report, China Stole Nuclear Secrets for Bombs, U.S. Aids Say." The article described suspected espionage that the government believed to have allowed the Chinese to steal nuclear secrets from an American Government laboratory and make significant advances in the miniaturization of China's nuclear bombs. The article indicated that there was a suspect in the espionage case but did not identify the subject by name. Attached hereto as Exhibit A is a copy of the March 6, 1999 article.

6. The March 6, 1999 story was written with the help of confidential sources with whom I had no personal contact. I do not know the identity of those confidential sources related to the parts of the March 6 story having anything to do with the unnamed suspect. Nor do I know what federal government agencies they may or may not have worked for at the time Mr. Risen and I wrote the March 6 story.

7. On April 28, 1999, Mr. Risen and I co-wrote another article published in The Times entitled "U.S. Says Suspect Put Code On Bombs In Unsecure Files." The article reported

that the government suspected one of the plaintiffs, in this case Wen Ho Lee, of spying for China and of having improperly transferred huge amounts of secret data from a computer system at a Government laboratory potentially compromising the United States' nuclear arsenal. Attached hereto as Exhibit B is a copy of the April 28, 1999 article.

8. Like the earlier article that I co-authored with Mr. Risen, the April 28, 1999 story was written with the help of confidential sources. I do not know the identity of those confidential sources. Other than the information that is listed in the April 28 story itself, I have no information about what federal government agencies the confidential sources may or may not have worked for at the time Mr. Risen and I wrote the April 28 story.

9. I have been informed that the plaintiffs in this case allege in their Second Amended Complaint that the March 6 and April 28, 1999 stories were both based on "illegal leaks" of private information from United States government officials to The Times.

10. I have further been informed that the March 6 and April 28, 1999 articles are the only articles of mine that plaintiffs claim have anything to do with this case.

11. In late August, I received a letter from Heather Hersh Gilhooly, counsel for plaintiffs in this case, attaching a subpoena seeking my deposition testimony and the production of various documents related to my reporting of the stories about Wen Ho Lee for The Times. A copy of the letter from Ms. Gilhooly and the attached subpoena is attached hereto as Exhibit C.

12. I have reviewed the document requests attached to the subpoena and have conferred with counsel about their substance. I do not have any documents in my possession, custody or control that are responsive to the subpoena.

13. I have been informed that plaintiffs' counsel has advised my counsel that they expect to ask me questions asking me to identify the agencies that the confidential source or sources for the March 6 and April 28, 1999 articles I co-wrote with Mr. Risen worked for. As stated above, I cannot identify which agency or agencies the source(s) worked for. Any assistance I could render in doing so would in my view compromise to a significant degree my ability to continue reporting as well as the ability of other journalists to do so.

14. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about conversations with and/or the identity of confidential sources would seriously impede all reporter's ability to gather and report the news. That is certainly true of me. Many of the stories that I have written have been based on confidential sources. Without confidential sources, it would be nearly impossible to do effective investigative reporting.

15. Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. This would seriously compromise journalists' integrity and independence qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events. Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality but one who would break it in the interest of a civil litigant.

16. If court orders compelling reporters' testimony about confidential sources in cases such as this were easily obtained, news organizations and reporters would be chilled in their reporting of news matters vital to the public. Reporters and editors might decide to eiiminate from news reports references to sources or other information likely to attract subpoenas. In some cases, the press might well choose to avoid certain controversial stories altogether.

17. In addition, compelling testimony of journalists about interactions with confidential sources would make the promises journalists make to such sources meaningless. I take such promises very seriously. I cannot break them.

18. Compelling testimony of journalists about interactions with confidential sources is particularly offensive in instances such as this one where it is clear that the plaintiffs have not exhausted all alternative sources of information. Specifically, I understand that the plaintiffs have not done everything within their power to get information from the government about the sources of any leaks to The Times concerning Wen Ho Lee.

19. I respectfully urge the Court to quash the subpoena.

/s/
Jeff Gerth

Sworn to before me this
23 day of September, 2002

/s/
Notary Public

Commission Expires: 1 March 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

In re Special Proceeding	)	Misc. 01-47T

AFFIDAVIT OF JAMES TARICANI

State of Rhode Island)
) ss.
County of Providence)

James Taricani, being duly sworn, says:

1. I am an investigative reporter for WJAR, a television station that is owned and operated by the National Broadcasting Company, Inc. WJAR serves Providence and Rhode Island and is the leading television station in the market. I have worked as a professional journalist for 28 years in Rhode Island.

2. In my capacity as the lead investigative reporter for WJAR, I have reported on the Operation Plunder Dome investigation and the corruption trial of Mayor "Buddy" Cianci and co-defendants. In the course of my investigation, I obtained a videotape containing hidden camera footage showing an alleged bribe being paid to defendant Frank Corrente by Antonio Freitas, a government witness. On February 2001, WJAR broadcast a news report concerning Operation Plunder Dome that featured excerpts from the videotape, as part of its 11:00 p.m. newscast.

3. The source who provided me the videotape did so only upon obtaining my assurance that I would protect the confidentiality of the identity of the source.

4. On July 15, 2002, I appeared for a deposition before Special Prosecutor Marc DeSisto. I refused to answer questions that would have required me to reveal information about my newsgathering practices and that could lead to the discovery of the identity of my confidential source.

5. In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court. I have scrupulously maintained the confidentiality of these sources and have never disclosed the identity of a confidential source to anyone other than another colleague working with me on the same story.

6. My ability to offer confidentiality to sources and to maintain their confidentiality has been indispensable to my ability to report important matters of public interest. Without a promise of confidentiality, many of my sources would not have come forward and provided valuable information. Some of the wrongdoing my stories have disclosed would never have come to light if I were not able to provide a meaningful promise of confidentiality to sources.

7. For example, in the early 1980's, I conducted a six-month investigation into the dumping of toxic waste in Rhode Island landfills. I reported that carting companies from New Jersey, supported by organized crime, were illegally dumping material in Rhode Island, with the support of organized crime in Rhode Island. This report sparked a state grand jury investigation and several civil lawsuits. I relied on several confidential sources to report this story. I

could not have uncovered this unlawful activity without obtaining information under the promise of confidentiality. Some of my sources feared that their physical safety could be threatened if it were known that they provided me information.

8. A confidential source was also central to my investigation in the 1980's into the Laborer's International Union of North America and its misuse of union dues. I believe the public attention provoked by my reports helped lead to the eventual indictment of the union's president and reputed mafia boss, Raymond Patriarca. I could not have reported this story without the participation of my confidential source. That source provided me information despite the source's belief that doing so constituted a threat to the source's life.

9. I have received four Emmy awards and ten Emmy nominations for my reporting. I have also received more than two dozen awards for investigative reporting from the Associated Press. In 1996, I won the prestigious Edward R. Murrow award from the Radio and Television News Directors Association. I received this award for my report concerning strip clubs in Providence and campaign contributions made to Mayor Cianci. Confidential sources played a critical role in the reporting of that story.

10. In 1996, I was inducted into the Rhode Island Heritage Hall of Fame for, as the citation stated, "serving the Rhode Island community by his reporting on government corruption, organized crime and health issues that affected the entire state." Maintaining a promise of confidentiality is critical to my ability to continue to gather news and report on these kinds of stories.

11. If compelled by the Court to disclose the identity of a confidential source, my ability to gather news and information from confidential sources, and report it to the

public, will be seriously undermined. Sources will fear that I cannot guarantee my promise of confidentiality. Many of my confidential sources have provided information at risk to their safety, livelihood and well-being. I have no doubt that sources will not be willing to come forward absent a meaningful promise of confidentiality or with the risk that this promise can be compromised. The loss of confidential sources will necessarily and substantially reduce the quantity, and quality, of important news available to the public about issues of widespread concern.

/s/
James Taricani

Subscribed and sworn to
this 6th day of September, 2002.

/s/
Notary Public

B43

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	Case No.
	)	1:03-CV-01793
	)	(RBW)
v.	)	
	)	
ATTORNEY GENERAL JOHN ASHCROFT, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF BRIAN ROSS

I, Brian Ross, hereby declare under the penalty of perjury as follows:

1. I am the Chief Investigative Correspondent for ABC News in New York. My reports are regularly broadcast on such television programs as *20/20, Primetime Live, Nightline, World News Tonight with Peter Jennings* and *Good Morning America*. My reporting has earned a number of major awards for outstanding investigative journalism in broadcasting, including five DuPont awards presented by Columbia University, four Peabody awards and ten Emmy awards. Between 2001 and 2004, I regularly presented news reports on the federal investigation of the anthrax terror attacks that killed five people and led to the closing of the United States Capitol for the first time in recent history. Where events warranted, those reports concerned, among other matters, the investigation of Dr. Steven Hatfill as a "person of interest" in the anthrax investigation. Several of

those broadcasts are referenced in a subpoena issued to ABC News, by which Dr. Hatfill evidently seeks the identification of confidential sources who provided me with information for those reports. A copy of the subpoena is attached hereto as Exhibit A. I submit this declaration in support of a motion to quash Dr. Hatfill's subpoena.

2. I have worked as a journalist since graduating from the University of Iowa in 1971. I began my career as a network correspondent in 1976 with NBC News, where I worked until 1994. I have been the Chief Investigative Correspondent for ABC News since that time.

3. In my investigative reporting for NBC News, ABC News and other news organizations, I have regularly found it necessary to rely upon information provided by confidential sources – individuals who agreed to speak with me only after being assured that their identities would not be revealed. Whether exposing wrongdoing, revealing facts embarrassing to those in power, or providing insight into governmental decision-making, these sources all relied upon my guarantee of confidentiality to bring into the open information they believed the public had a right to know. In all of these cases, factual information of significance to the public would not have been brought into the public domain had I not promised to maintain in confidence the identity of those who provided the information. Some examples of my reporting that depended upon information from confidential sources are set forth below.

4. In the 1970's and 1980's, my reporting included stories on the Mafia domination of American labor unions, failures in the federal government's war on drugs, criminal activities of the Bank of Credit and Commerce International ("BCCI"), attempts by Saddam Hussein to acquire materials to build a nuclear weapon, and illegal child labor used by the Walmart corporation in Bangladesh. In each of these reports,

I relied extensively on information obtained from confidential sources in the federal government and elsewhere, without whom I could not have brought these stories to light.

5. Since joining ABC News in 1994, I have relied on confidential sources to report huge flaws in the FBI's crime laboratory, the sale of prisoners' kidneys by the People's Republic of China, a corruption scandal that led to the indictment of the Governor of Illinois, and the unchecked influence of large corporations in federal political campaigns. Each of these stories was based on information obtained from confidential sources, without whom these reports simply would not have been possible.

6. Since September 11, 2001, I have been one of the primary reporters on terrorism for ABC News. Shortly after the attacks of 9/11, I was the first journalist to report on the FBI's failure to pursue leads regarding Zacarias Moussaoui, the reputed "20th hijacker." Transcripts of some of my reports on that topic are attached to this Declaration as Exhibit B. These reports depended in large measure on information provided by confidential sources, without whom I would have been unable to discover and report that the FBI had Moussaoui in custody several weeks before the 9/11 attacks. I believe that these reports and others helped lead to the establishment of the President's 9/11 Commission.

7. Also in September, 2001, I was one of the first reporters to publicly identify Mohammed Atta and describe him as the ringleader of the World Trade Center and Pentagon attacks. Transcripts of these broadcasts are attached as Exhibit C. For these reports, I again relied extensively on confidential sources, without whom I would have been unable to inform the public on events of great importance.

8. For the last three years I have continued to investigate and report on the intelligence failures of the United States government prior to the 9/11 attacks. For these reports, I again drew heavily on information provided by confidential sources. Absent the information provided by these sources, I could not have reported these stories.

9. In my current reporting on terrorism and the war in Iraq, I rely constantly on factual information and observations provided by intelligence and law enforcement professionals, and other government and congressional experts, who speak only upon the condition of complete anonymity. If I were to breach a promise of confidentiality to any of my confidential sources, or if in the future I were unable to assure anonymity to sources, my ability to report on these subjects accurately and effectively would be greatly diminished if not destroyed entirely. Knowledgeable individuals would be reluctant to discuss sensitive matters with me for fear that their identities may one day be revealed. Inevitably, the American public would receive less information on critical issues related to the performance of their government.

10. In this case, Dr. Hatfill seeks to identify the confidential sources who provided me with information concerning the massive federal investigation into the anthrax terror attacks – one of the largest investigations in FBI history. This story, much like the investigation, is ongoing, and I am continuing to gather information and deliver reports as events warrant.

11. I began covering the subject of the anthrax attacks in October, 2001, with the first reports of a death in Florida. As the investigation progressed, I learned and reported that Dr. Hatfill was under investigation in connection with the anthrax attacks. The June 25, 2002 *World News Tonight* broadcast include my report that FBI agents had executed a

search warrant at Dr. Hatfill's apartment. See Exhibit D. That report disclosed that the FBI had come to regard Dr. Hatfill as a "person of interest" in its investigation. My report was based in large measure on interviews with individuals who insisted on anonymity. I believe that the public interest was served by the disclosure that the FBI had a lead in the anthrax case. At that time, many Americans believed that foreign agents working for Iraq may have been responsible for the anthrax attacks. The information in my June 25, 2002 report revealed that the FBI was focusing much of its attention on an *American* suspect, not a foreign agent. The report was based largely on information obtained from confidential sources on the express condition that I would not reveal their names.

12. On the June 26, 2002 *Good Morning America* program, I again reported that Dr. Hatfill was a person of interest in the investigation. See Exhibit E. I also reported that there was circumstantial evidence potentially linking Dr. Hatfill to the case, including the fact that he had once lived near an elementary school in the town of Greendale, Zimbabwe (a name similar to the "Greendale School" used on the return address for the anthrax letters). Here again, my reporting depended largely upon confidential sources to whom I promised anonymity. I believe that this report, too, was in the public interest.

13. On the June 27, 2002 *World News Tonight* program, I reported that the government was investigating whether there might be a connection between the anthrax attacks and a government report, written before the attacks, which described how an attack might hypothetically be carried out. The government report contained many details that were consistent with the events that ultimately occurred. See Exhibit F. As I reported, ABC News obtained a copy of the government report, which accurately predicted that an

anthrax attack could be sent through the mail, containing 2.5 grams of contaminated powder with one trillion anthrax spores per gram of powder. On that same broadcast, I also disclosed that the government report was written for Dr. Hatfill, and that former colleagues of Dr. Hatfill said that he received the anthrax vaccine and had access to a supply of anthrax while working as a government scientist. I believe that this information was of significant importance to a public still deeply troubled by these attacks and eager to know whether the authorities had made any progress in their investigation. Once again, were it not for promises of confidentiality, much of this information would have been unavailable to me and to ABC News' audience.

14. On August 11 and 12, 2002, I again appeared on *World News Tonight*, this time to report about Dr. Hatfill's public declaration of his own innocence. See Exhibits G & H. On those broadcasts, Dr. Hatfill was shown responding to the government's investigation, and stating that he had nothing to do with the mailing of the anthrax letters. I, in turn, reported that Dr. Hatfill remained a person of interest to investigators, in part because of information suggesting he had a motive for the attacks, and in part because of the reaction of bloodhounds to the scent at his apartment. Dr. Hatfill's denials notwithstanding, he remained, at that time, the focus of the government's investigation, and therefore at the center of a story that continued to capture the public's attention. Here again, the strength and accuracy of my reporting depended largely on anonymous sources who insisted that I not disclose their identity.

15. On October 22 and 23, 2002, I appeared on *World News Tonight* again to provide more details about the use of bloodhounds in the investigation of Dr. Hatfill. See Exhibits I & J. In these broadcasts (the latter report was substantially the same as my report from the previous night), I reported

that the FBI considered the reaction of the bloodhounds to Dr. Hatfill's scent to be an important piece of evidence. I also reported that investigators had gathered information on Dr. Hatfill's activities while in Africa in the late 1970s and 80s, a time period in which he claimed to have served with a Rhodesian military unit that had been accused of using anthrax and other biological agents against opponents of white minority rule. These broadcasts, too, relied extensively on confidential sources, who told me that the FBI was building a "growing case of circumstantial evidence" against Dr. Hatfill. Had I not made promises of confidentiality to my sources, my ability to report on these newsworthy matters would have been greatly compromised.

16. On June 9 and 10, 2003, I appeared, respectively, on the *World News Tonight* and *Good Morning America* programs to report on the draining of a Maryland pond suspected of containing evidence relevant to the anthrax investigation. See Exhibits K & L. As I reported on those occasions, the pond was being drained at significant public expense and inconvenience over a period of several weeks. My report sought to address the reasons for this government action, which, as my confidential sources told me, was related to the FBI's "working theory" that Dr. Hatfill used makeshift lab equipment to place anthrax into envelopes, and then dumped the lab equipment into the pond. I also reported that the FBI's continuing interest in Dr. Hatfill was buffeted, in part, by his alleged presence in Florida around the time that an anthrax letter was sent to a media company in that State, and by his apparent possession of the powerful antibiotic Cipro at the time of the anthrax attacks.[1] Once again, much of the information in my report – which, I

[1] Dr. Hatfill's subpoena also references a second transcript from the July 10, 2003 broadcast of Good Morning America. A copy of that transcript is attached as Exhibit M.

believe, served the public interest – only became available to me after I made promises of confidentiality to my sources.

17. Finally, on July 20, 2004, I appeared on *World News Tonight* to report on a change in the investigation's focus. See Exhibit N. As I reported that night, confidential sources informed me that lab tests had shown that the anthrax used in the attacks had been developed in the U.S. Army's weapons lab at Ft. Detrick, Maryland. As a consequence of that finding – which came nearly three years after the attacks, and with the perpetrator still at large – the FBI sent more than twenty agents to Ft. Detrick to pursue this lead in the anthrax investigation. I believe that the public had a right to know that the investigation into these attacks had taken a new turn, and I sought out information that would enable me to explain these events and their significance to ABC's audience. Here again, just as I have throughout my career, I learned significant pieces of information for that report from sources who would only discuss the investigation on condition of complete anonymity. My ability to maintain the confidence of those sources is absolutely critical to my ability to continue reporting about developments in the anthrax investigation.

18. I cannot identify my confidential sources for these reports without violating my commitments to them that I would maintain their anonymity. Those commitments were a condition of my interviews with these individuals. If I had not promised them anonymity, they would not have provided the information I was able to report. If I were to breach my promise to these sources, even under Court order, I fear that I would be branded as someone who does not keep his word, and – as a result – the kind of enterprise reporting I have pursued over the course of my 30-year career as a journalist would no longer be possible.

19. For these reasons, more fully explained in the legal memorandum submitted on my behalf, I respectfully request that the Court quash Dr. Hatfill's subpoena.

I declare under the penalty of perjury, this 2nd day of February, 2005, that the foregoing is true and correct.

/s/
Brian Ross

B52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	Case No.
	)	1:03-CV-01793
	)	(RBW)
	)	
	)	
ATTORNEY GENERAL	)	
JOHN ASHCROFT, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF DANIEL KLAIDMAN

I, Daniel Klaidman, hereby declare under the penalty of perjury as follows:

1. I am the Washington Bureau Chief for *Newsweek*, a weekly newsmagazine published by Newsweek, Inc. ("Newsweek"). In 2002 and 2003, I authored or co-authored a number of articles reporting on the federal investigation into the anthrax attacks of 2001. Two are referenced in a subpoena that Dr. Steven Hatfill served on Newsweek in connection with his Privacy Act case against the government. A copy of the subpoena is attached hereto as Exhibit A. I understand that Dr. Hatfill is seeking, among other things, the identities of any confidential sources that provided me and/or my co-authors with information for those articles. I submit this declaration in support of the motion to quash Dr. Hatfill's subpoena filed by the Washington Post, Newsweek, and the American Broadcasting Companies, Inc.

2. Upon graduating from Georgetown University in 1986, I began my career as a reporter for Legal Times, where I remained for eight years. I have worked as a reporter and/or Bureau Chief for Newsweek since 1996.

3. Of late, much of my reporting has been focused on terrorism and national security, but in years past much of my work focused on the Department of Justice.

4. In the course of my reporting for Newsweek and Legal Times, I have frequently relied upon information received from individuals in the government who agreed to speak with me only after being assured that their identities would be kept in complete confidence. These sources possessed information that they, and I, believed the public had a right to know. For a variety of reasons, however, they were unwilling to provide that information for attribution by name. The information that these sources possessed was often invaluable in explaining governmental actions and informing the public about the status of investigations and other matters in which the public had a vital interest. In such cases, I have not hesitated to promise, as a condition of receiving the information, that the source's identity will be kept confidential. Some examples of my reporting that depended upon information from confidential sources are set forth below.

5. In 1995, I reported on the stand-off and deadly FBI assault at Ruby Ridge. *See, e.g.*, Exhibit B. Critical to my account was the acquisition of a confidential report, written by the Department of Justice, from which I obtained evidence of the cover-up of the circumstances of the deadly assault. That report, and other supporting information I gathered, was only made available to me on the condition that I retain my source's anonymity. The publication of the information provided by this confidential source generated public and

official attention and helped spark a Congressional investigation of the Ruby Ridge episode.

6. In 1997, I wrote an article on the serious, and all too frequent, mistakes made by forensic experts at the FBI's vaunted crime laboratory. A copy of that story is attached to this Declaration as Exhibit C. Deeply embarrassing to the Bureau, and especially to then-Director Louis Freeh, the information at the heart of the article was only available to me because I made unequivocal and indelible promises of confidentiality. In part because of my articles and others, the FBI made significant reforms in the operation of its laboratories. I would have been unable to write the article were it not for the promises of confidentiality made to my sources.

7. During the 1990s, I authored several articles, published by Newsweek, that were deeply embarrassing to the Clinton Administration – including coverage of the Monica Lewinsky scandal, Paula Jones's sexual harassment lawsuit against the President, and the Democratic party's campaign finance scandal. *See, e.g.*, Exhibit D. Some of those articles also revealed information on the conduct of the Whitewater Independent Counsel's investigation that resulted in public criticism of that office. I believe that these articles served the public interest by promoting accountability and ethics in government. It is also my firm conviction that absent an assurance of confidentiality to my sources, I would not have been able successfully to report on matters of such sensitivity to a sitting President.

8. In 1997, I wrote several articles for Newsweek on the efforts of China to influence domestic politics. *See, e.g.*, Exhibit E. Those articles revealed, among other things, that the Chinese government secretly financed a California state politician's electoral campaigns. Much of the information contained in those articles came from interviews with

confidential sources who were unable publicly to disclose matters that were highly sensitive both to our government and that of a foreign nation.

9. My recent reporting has focused, in large measure, on terrorism, and the United States' efforts to combat it. In my capacity as Washington Bureau Chief, I oversaw Newsweek's award-wining coverage of September 11th, 2001, and its aftermath. I also co-authored several cover stories, including *The Hijackers We Let Escape*, published on June 10, 2002, which revealed the intelligence community's failure to share information about two 9/11 terrorists who had been living in the country for a year and a half before participating in the attacks, and *The Enemy Within*, published on June 23, 2003, which detailed how Al Qaeda was recruiting new members within the United States and planning to conduct additional attacks throughout the country. *See* Exhibit F. Those articles, which covered issues of manifest public importance, could not have been published without confidential sources.

10. More recently, I broke the story of White House Counsel Alberto Gonzales's central role in the creation of the White House's policy on interrogation of detainees—a policy that continues to be the focus of public controversy in this country and abroad. *See* Exhibit G. I never would have been able to bring this story to the public's attention without promising confidentiality to my sources.

11. In my current reporting on terrorism and other subjects, I continue to rely heavily upon the ability to obtain information through assurances of confidentiality made to members of the intelligence and law enforcement communities. Were I to breach a promise of confidentiality and identify any one of my sources, or were I in the future unable to assure anonymity to new sources, I would be unable to cover these areas accurately and effectively.

Knowledgeable individuals would either not discuss matters or would only say what is already on the public record, whether it was accurate or not.

12. In this case, Dr. Hatfill seeks to identify the confidential sources who provided information for use in three news stories published by Newsweek. As Washington Bureau Chief, I was involved in Newsweek's coverage of the anthrax attacks from the beginning, both as a supervisor of other reporters' work, and as a reporter in my own right. Mark Miller and I co-authored an article entitled, *The Hunt for the Anthrax Killer*, that was published in the August 12, 2002, edition of Newsweek.[1] *See* Exhibit H. The article described the animated response of FBI bloodhounds—which had first been presented with "scent packs" from the anthrax letters sent to Senators Tom Daschle and Patrick Leahy—upon arriving at Dr. Hatfill's apartment. The bloodhounds had similar reactions at two other locations known to have been frequented by Dr. Hatfill. As we explained in the article, the reaction of those bloodhounds figured prominently among the FBI's reasons for continuing to regard Dr. Hatfill as a "person of interest" to the investigation.[2] The information contained in that article came from interviews with knowledgeable persons who insisted on complete anonymity. Had we not agreed to that condition, we could not have written the article. I believe that the public interest was served by my having made that promise and disclosed to the public the progress that the FBI believed it was making towards solving this notorious crime.

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[1] Mr. Miller is no longer a Newsweek employee, but Dr. Hatfill's subpoena to Newsweek does make reference to an article written by Mr. Miller and published on the Internet on August 12, 2002. Mr. Miller relied on confidential sources for that article, a copy of which is attached hereto as Exhibit I.

[2] Attorney General John Ashcroft publicly identified Dr. Hatfill as a "person of interest" in the investigation on August 6, 2002.

13. In its May 26, 2003, edition, Newsweek published an additional article mentioning Dr. Hatfill, this time co-authored by Michael Isikoff and me. *See* Exhibit J. Entitled *Finally the FBI Uncovers A Tantalizing Clue*, that article reported that, acting on a tip, FBI divers had recovered a plastic container from a Maryland pond, and that some investigators believed it could have been used in the anthrax attacks. While that information had previously been reported by the Washington Post, among others, it was supplemented by information provided by confidential sources who told us that some investigators were taking the theory seriously, but others had dismissed it as fantasy. On the basis of other information obtained from confidential sources, we were able to report that the investigators were first led to the Maryland pond by a tip given by a friend of Dr. Hatfill's. According to our sources, that friend told the FBI about a conversation in which Dr. Hatfill suggested that the anthrax could have been made in the woods and the evidence tossed "in a lake." These reports added significant dimensions to the public's understanding of the anthrax investigation. But for our promises of confidentiality, that information could not have been uncovered and reported.

14. If Newsweek or I were to identify the confidential sources for Newsweek's reporting on the anthrax investigation, that would be in violation of firm commitments to those sources, without which the information would not have been provided. If Newsweek or I were to breach the commitments that were made to those sources, even under Court order, our ability to report effectively on matters of legitimate public interest would be seriously undermined.

15. For those reasons and others, more fully explained in the legal memorandum submitted on Newsweek's behalf, I respectfully request that the Court quash Dr. Hatfill's subpoena to Newsweek.

I declare under the penalty of perjury, this 28th day of January, 2005 that the foregoing is true and correct.

/s/
Daniel Klaidman

B59

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	Case No.
	)	1:03-CV-01793
	)	(RBW)
	)	
	)	
ATTORNEY GENERAL	)	
JOHN ASHCROFT, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF ALLAN LENGEL

I, Alan Lengel, hereby declare under the penalty of perjury as follows:

1. I am a staff writer for The Washington Post. Since October 2001, I have authored or co-authored a number of news articles reporting on the anthrax attacks, their aftermath, and the ensuing criminal investigation. Several of those articles concerned Dr. Steven Hatfill, whom the Attorney General has described as a "person of interest" in the investigation. I submit this declaration in support of The Washington Post's motion to quash Dr. Hatfill's subpoena, which evidently seeks to identify confidential sources who provided information to The Post concerning him. A copy of the subpoena is attached hereto as Exhibit A.

2. I have worked almost continuously as a journalist since 1977 for, among others, The Oregonian, The Detroit

News and, since March 1997, The Washington Post. During that time, I have also written freelance articles for The New York Times and Bloomberg News. I have also worked as a freelance reporter for Newsweek.

3. In my reporting for The Washington Post and other news organizations, I have sometimes found it necessary to rely upon information provided by confidential sources—individuals who agreed to speak with me only after being assured that their identities would not be revealed. In general, those individuals were providing information about activities within government that they believed the public had a right to know. Sometimes that information provided evidence of wrongdoing; sometimes it revealed facts that were embarrassing to those in power; and sometimes it provided insights into how governmental decisions were made or how current events affected the public interest. In all of these cases, factual information that I believed was of vital interest to the public would not have been published if I had not promised to maintain the confidentiality of those individuals who were in a position to disclose it.

4. Since February 2001, I have been writing articles about federal and local law enforcement in the Washington metropolitan area. In my current reporting on local law enforcement, I rely constantly upon factual information and observations provided by law enforcement sources who will speak only upon the condition of complete anonymity. If I were to breach a promise of confidentiality to any of my confidential sources, or if in the future I were unable to assure anonymity to sources, I would essentially be unable to cover these areas accurately and effectively. Knowledgeable individuals would either not discuss matters or would only say what is already on the public record, whether it was accurate or not.

5. In this case, Stevens Hatfill is seeking "information obtained regarding governmental investigation of whether Steven J. Hatfill, M.D. had any connection with the 2001 mailings of anthrax through the U.S. mail," including information contained in four articles that I wrote or co-authored. Dr. Hatfill is apparently seeking, among other things, to identify the confidential sources who provided information for these articles.

6. On January 25, 2003, The Post published an article that I wrote entitled "Hunt for Clues in Anthrax Case Revived: FBI Agents Return to Frederick Forest in Search Reportedly Linked to Scientist." See Exhibit B. The article reported that "[t]he FBI has again returned to a forested area in Frederick to search for clues in the anthrax killings case." The article further reported that the search was tied to Steven Hatfill, and that it was "triggered by a hypothetical statement Hatfill had made about anthrax." I believe the public interest was served by the publication of this article. It would have been impossible for me to collect and report the information contained in this article if I had not promised anonymity to my sources.

7. On August 1, 20003, The Post published an article that I wrote with Washington Post staff writer Guy Gugliotta entitled, "Md. Pond Produces No Anthrax Microbes; FBI Sought Clues in Deadly Attacks." See Exhibit C. The article reported that "lab tests of soil samples taken from a Frederick pond that the FBI drained in June showed no traces of anthrax bacteria." The article was based in large part on interviews with individuals who insisted on anonymity. Again, the public interest was served, I believe, by the publication of this article, and it would have been impossible for me to write the article if I had not promised anonymity to important sources.

8. On March 30, 2004, The Post published an article that Carol Leonnig and I wrote entitled "Judge Delays Lawsuit To

Help Anthrax Probe." See Exhibit D. The article reported that "[I]nvestigators have narrowed the likely source [of the anthrax] to a short list of labs, including Fort Detrick, the Dugway Proving Ground in Utah, and Louisiana State University." It also reported that "Hatfill continues to be a key focus of the probe," but that some law enforcement sources "doubt that the team of 25 agents and 12 postal inspectors will find the evidence to make the case against anyone." This information was provided by confidential sources, and it was in the public interest, I believe, for this information to be known.

9. On July 18, 2004, The Post published an article that I wrote entitled "Anthrax Probers Still Seek Md. Leads; Investigators Keep Returning to Frederick." See Exhibit E. The article provided an update on the anthrax investigation and its continuing focus at least in part on the Frederick area. It was based in part on information obtained from confidential sources. I believe that this article, too, was in the public interest. Much of it could not have been written if I had not assured anonymity to my sources.

10. In addition to the articles discussed above, Dr. Hatfill's subpoena makes reference to three other Post articles: (a) an article, dated May 11, 2003, by Marilyn Thompson[1] and entitled *New Find Reignites Anthrax Probe* (Exhibit F); (b) an article, dated June 10, 2003, by David Snyder and Marilyn Thompson and entitled *Md. Pond Drained for Clues in Anthrax Probe* (Exhibit G); and (c) an article, dated September 14, 2003, by Marilyn Thompson and entitled *The Pursuit of Steven Hatfill* (Exhibit H). I contributed to each of these articles, and I understand that they were based in part on information provided by confidential sources.

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[1] Marilyn Thompson is no longer a Post employee.

11. If The Post or I were to identify the confidential sources for The Post's reporting on the anthrax investigation, that would be in violation of firm commitments to those sources, without which the information would not have been provided. If The Post or I were to breach the commitments that were made to those sources, even under Court order, our ability to report effectively on matters of legitimate public interest would be seriously undermined.

12. For these reasons, more fully explained in the legal memorandum submitted on The Post's behalf, I respectfully request that the Court grant The Post's motion to quash.

I declare under the penalty of perjury, this 27th day of January 2005, that the foregoing is true and correct.

/s/
Allan Lengel

(4) (4)

Nos. 04-1507 & 04-1508

Supreme Court, U.S.
FILED
MAY 18 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JUDITH MILLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MATTHEW COOPER AND TIME INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; BLOOMBERG NEWS; THE COPLEY PRESS, INC.; COX NEWSPAPERS, INC.; DAILY NEWS, L.P.; THE E.W. SCRIPPS COMPANY; FOX NEWS NETWORK, L.L.C.; KNIGHT RIDDER; THE MCCLATCHY COMPANY; THE MCGRAW-HILL COMPANIES, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPER ASSOCIATION OF AMERICA; NEW YORK PRESS CLUB; NYP HOLDINGS, INC.; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS WITHOUT BORDERS; REUTERS AMERICA LLC; AND WHITE HOUSE CORRESPONDENTS' ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 2
ARGUMENT 3
I. The Court Should Revisit *Branzburg*, Which Is Emblematic of an Important Doctrinal Tension Within the Court's First Amendment Jurisprudence Regarding Generally Applicable Laws. 3
II. Properly Understood, the Court's Cases Reflect a Practical Approach Attuned to the Actual Burdens at Issue in Each Situation. 11
III. The Court Should Grant Certiorari and Enforce a First Amendment Privilege or a Comparable Common Law Privilege 14
CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Associated Press v. NLRB, 301 U.S. 103 (1937) 12

Associated Press v. United States, 326 U.S. 1 (1945) 12

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)..... 7

Bartnicki v. Vopper, 532 U.S. 514 (2001)..... 17

Boy Scouts of America v. Dale, 530 U.S. 640 (2000) 8

Branzburg v. Hayes, 408 U.S. 665 (1972) 2, 4, 10, 15, 16

Butterworth v. Smith, 494 U.S. 624 (1990)..... 18

Cantwell v. Connecticut, 310 U.S. 296 (1940)..... 9

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 19

City of Erie v. Pap's A.M., 529 U.S. 277 (2000)..... 8, 13

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 7, 8, 13

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 2, 4, 5, 12

Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996)..... 17

Employment Division v. Smith, 494 U.S. 872 (1990) 10, 14, 18

Estes v. Texas, 381 U.S. 532 (1965)..... 1

Follett v. Town of McCormick, 321 U.S. 573 (1944) 9

Garrison v. Louisiana, 379 U.S. 64 (1964) 20

Herbert v. Lando, 441 U.S. 153 (1979) 6

Houchins v. KQED, Inc., 438 U.S. 1 (1978) 6, 7

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 7

Jaffee v. Redmond, 518 U.S. 1 (1996) 20

In re Madden, 151 F.3d 125 (3d Cir. 1998) 19

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 15

Mills v. Alabama, 384 U.S. 214 (1966) 1, 16

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 9

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 4

New York Times Co. v. United States, 403 U.S. 713 (1971) 20

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 12

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 15

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 8

Sherbert v. Verner, 374 U.S. 398 (1963) 13

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 16

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 17

United States v. O'Brien, 391 U.S. 367 (1968)..... 7, 8, 13

von Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987)..... 19

Wisconsin v. Yoder, 406 U.S. 205 (1972) 9

Wooley v. Maynard, 430 U.S. 705 (1977)..... 9

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 12

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)..... 16

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 5, 6, 12, 13

RULES

Fed. R. Crim. P. 17(c)(2)..... 18

Fed. R. Civ. P. 26(b)(2)..... 18

Fed. R. Civ. P. 26(c)..... 18

Fed. R. Civ. P. 45(c)(3)..... 18

Fed. R. Evid. 501 20

MISCELLANEOUS

David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201 (1997) 4

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Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46 (1987) 11

2 Charles Alan Wright, *Federal Practice and Procedure* (3d ed. 2000) 18

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INTEREST OF *AMICI CURIAE*

Amici are eighteen newsgathering organizations, media organizations, and reporters' groups from across the country, many of which employ and represent thousands of reporters like the Petitioners in this case.[1] As members of the press, *amici* represent what this Court has called the "constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). *Amici* take this public responsibility seriously and thus have a strong interest in ensuring that the press retains its historic role as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

The press's ability to play its crucial role in our society depends in part on its capacity to gather valuable information from sources who demand assurances of anonymity. The Court of Appeals affirmed rulings holding journalists and a publisher in contempt of court for honoring promises to protect the identities of their confidential sources. That decision is in conflict with decisions from other circuits that recognize constitutional or common law privileges protecting reporters from compelled disclosure of confidential information. These inconsistent rulings create confusion

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[1] A complete list of *amici* is set out in the Appendix. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation or submission of this brief. *Amici* are filing this brief with the consent of the parties. Written consents are on file with the Clerk.

about the extent of protection afforded the newsgathering undertaken by *amici* on a daily basis. Moreover, the decision below, and other recent decisions like it, will chill relationships between *amici*'s reporters and their sources. *Amici* thus have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the petitions for certiorari have shown, these cases merit review because the circuits are in disarray in their interpretations of this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and because circumstances requiring the assertion of the reporter's privilege have begun to arise with increasing – indeed alarming – frequency. Those factors alone provide sufficient grounds to grant review. But there are other considerations that underscore the need for the Court to grant certiorari.

The division among the circuits over whether and how the First Amendment protects journalists from forced disclosure of their confidential sources reflects an underlying inconsistency in the law. This Court's First Amendment jurisprudence, much of it developed since *Branzburg* was decided, includes cases taking two quite different approaches to the question whether the Constitution demands heightened scrutiny when facially neutral, generally applicable laws are being applied in a manner that will burden the exercise of First Amendment rights. On the one hand, in cases like *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court has stated that generally applicable laws unrelated to expression categorically do not create First Amendment issues, even when they are applied in a way that will burden expression. But in a wide variety of other cases, the Court has taken just the opposite approach, holding that generally applicable laws *do* require heightened scrutiny when they pose a genuine risk to First Amendment values.

A grant of review here would provide the Court with an opportunity to resolve this doctrinal tension. Moreover, as we show, it is possible to articulate workable standards that reconcile these seemingly inconsistent lines of cases. Where, as in *Cowles Media* and similar cases, the claim of burden on freedom of expression is facially unpersuasive, no heightened scrutiny of the application of general laws in particular cases is required. But where application of any law threatens to impose *real* burdens on free speech rights, the Court should apply heightened scrutiny under the First Amendment, as it has done many times in the past. Such an application of heightened scrutiny is particularly appropriate where a mechanism already exists for measuring the burdens the law imposes on First Amendment rights.

Under this approach, heightened First Amendment scrutiny should apply when journalists resist compelled revelation of their confidential sources. Forcing reporters to breach promises of confidentiality would seriously damage the press's newsgathering role, which in turn would deprive the citizenry of information of great public concern. Moreover, here there already exist procedural and judicial mechanisms that can accommodate the reporter's privilege, easing any concerns about workability. Independently, the same considerations would warrant recognition of a common law (but constitutionally infused) privilege. The Court should grant certiorari to resolve these pressing issues.

ARGUMENT

I. The Court Should Revisit *Branzburg*, Which Is Emblematic of an Important Doctrinal Tension Within the Court's First Amendment Jurisprudence Regarding Generally Applicable Laws.

Amici respectfully suggest that the important issues raised by press subpoenas and the reporter's privilege cannot be

adequately addressed simply by attempting to parse the precedential meaning of *Branzburg*'s majority opinion or Justice Powell's "enigmatic concurring opinion," 408 U.S. at 725 (Stewart, J., dissenting). Rather, the Court should focus on the more basic principles at issue here. Key to that undertaking is the question whether generally applicable laws that burden press and speech rights require a degree of heightened constitutional review. Federal Rule of Criminal Procedure 17, the law at issue here, is a neutral and generally applicable grant of authority for subpoenas in criminal cases. But application of that law to require disclosure of reporters' confidential sources can have a significant chilling effect on newsgathering, as the record in this case demonstrates. *See* Cooper/Time Pet. App. 123a-137a; Miller Pet. App. 108a-114a, 165a-179a, 207a-225a. This Court's First Amendment cases provide support both for applying heightened scrutiny in such a context as well as for withholding such scrutiny altogether.[2] That ambivalence, in fact, is reflected in *Branzburg* itself, where the Court seemed to come down on both sides of the doctrinal divide. The Court should grant review to remedy the confusion created by these two competing doctrinal strands.

1.—On one side of the divide are cases like *Cowles Media*, which suggest that as a categorical matter, generally applicable laws raise no problems under the First Amendment. *See* 501 U.S. at 669 ("[G]enerally applicable

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[2] *See, e.g.*, David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201, 201-02, 203 (1997) (stating that the cases are "in conflict" and send "mixed signals"); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 Wm. & Mary L. Rev. 925, 939 (1998) (calling the doctrine in speech and press cases "confused"); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 Const. Comment. 401, 402 (1995) ("Free speech doctrine is unclear [regarding whether] such incidental restrictions raise a First Amendment concern.").

laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). In concluding that a general law that "does not target or single out the press" does not trigger heightened constitutional scrutiny, *id.* at 670, the Court relied on cases applying general regulatory laws such as the Sherman Act and labor laws to press companies. *See id.* at 669-70. "[E]nforcement of such general laws against the press," the Court said, "is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670.

2. This categorical rejection of special scrutiny for generally applicable laws is, however, at odds with a wide variety of cases in which the Court has indicated that general applicability is not the end of the First Amendment inquiry. Indeed, this other set of cases *confirms* the need to weigh First Amendment concerns when applying general laws to the press. At least three areas of the Court's First Amendment jurisprudence reflect this other doctrinal strand:

a. First, the Court has recognized the need to balance First Amendment interests when considering the application of general laws that have the potential to disrupt the newsgathering process. In *Zurcher v. Stanford Daily*, for example, the Court confronted the question whether the First Amendment barred police from searching a newspaper office pursuant to an otherwise valid search warrant. 436 U.S. 547 (1978). Writing for a five-Justice majority, Justice White rejected a *per se* bar on such searches, but his opinion recognized that prior cases "insist that the courts apply the warrant requirements with particular exactitude *when First Amendment interests would be endangered.*" *Id.* at 565 (emphasis added); *see id.* at 564-65 (citing cases holding that ordinary procedures for obtaining search warrants are insufficient where the warrant seeks material protected by the

First Amendment, such as books). Further, the Court emphasized that magistrates should "guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper." *Id.* at 566. As in *Branzburg*, Justice Powell provided the decisive vote and explained that a balancing approach is required:

> As the Court's opinion makes clear, the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case . . . . [A] magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . when he weighs such factors.

Id. at 570 (Powell, J., concurring) (citation omitted).[3]

To similar effect is *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), which involved, *inter alia*, a ban on visitors bringing cameras into a prison. The policy applied to all visitors, including the media, but the effect of the policy was to impose a burden on journalists' ability to report on prison conditions. No opinion garnered a majority, but Justice Stewart cast the deciding vote. He rejected the argument that the Court should ignore the burden imposed by such a general policy on the press's newsgathering role. To the

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[3] A year later, in *Herbert v. Lando*, the Court addressed the related question whether libel plaintiffs could conduct discovery into a press defendant's editorial processes. The Court declined to impose a *per se* bar but again warned that the rules of discovery should be "firmly applied" to protect the media from undue burdens. 441 U.S. 153, 177 (1979); *see also id.* at 178-79 (Powell, J., concurring) (explaining that a court "has a duty to consider First Amendment interests" and "when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated").

contrary, "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public." *Id.* at 16 (Stewart, J., concurring). Therefore, the incidental burden on freedom of the press had to be considered:

> The Constitution requires sensitivity . . . to the special needs of the press in performing [its role] effectively. . . . [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Id. at 17.

The Court has demanded similar sensitivity in other cases where general laws impinged on the press's ability to function. For example, the tort of intentional infliction of emotional distress is a neutral and generally applicable law that regulates many kinds of behavior, but it is nonetheless subject to First Amendment limits. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 52-56 (1988). To treat publications the same as other means of causing distress would threaten to undermine robust public debate. *Id.* at 53-56; *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891, 911-15 (1982) (holding that state tort of malicious interference with business could not be applied to boycott that was protected by freedoms of speech and assembly).

b. Second, the Court has applied heightened scrutiny to laws of general applicability in its "expressive conduct" cases. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67 (1991) (plurality opinion). The *O'Brien* line of cases involves situations in which a person is attempting to express something by engaging in conduct that is proscribed

for reasons other than its expressive potential – such as destroying a draft card or sleeping in a park (both of which can be part of a protest). *See O'Brien*, 391 U.S. at 376; *Clark*, 468 U.S. at 293. Although these cases involve laws of general applicability, the Court nevertheless has mandated heightened First Amendment scrutiny of their application to expressive conduct.

A general ban on public nudity, to take one recurring example, ostensibly applies to expressive and non-expressive conduct alike, but this Court has held that such a law's incidental burden on expressive nude dancing nonetheless triggers First Amendment scrutiny. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (plurality opinion of O'Connor, J.) (applying intermediate scrutiny even though the challenged ordinance was "a general prohibition on public nudity"); *id.* at 310 (Souter, J., concurring in part and dissenting in part); *id.* at 317 (Stevens, J., dissenting). The Court has declined to hold that, because of the generality of the ban, the incidental burden on expression "'is not subject to First Amendment scrutiny at all.'" *Id.* at 307-08 (Scalia, J., joined by Thomas, J., dissenting) (quoting *Barnes*, 501 U.S. at 572 (Scalia, J., concurring in the judgment)).

The Court has taken a similar approach in its "expressive association" cases, which require First Amendment scrutiny of generally applicable anti-discrimination laws. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Even though such laws regulate conduct that is typically non-expressive, the cases require stringent constitutional review approaching strict scrutiny when those general laws are applied in a manner that burdens an association's ability to engage in expression. *See Dale*, 530 U.S. at 648.

c. Third, in cases blending free speech and free exercise concerns, the Court has repeatedly held, before and

after *Branzburg*, that the general applicability of a law in no way prevents a constitutional violation. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating law against defacing license plates as applied to those who objected to the state's motto on moral and religious grounds); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidating license tax on solicitation as applied to the dissemination of religious ideas); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating licensing scheme for those engaged in charitable and religious solicitations as applied to Jehovah's Witnesses). Indeed, *Murdock* specifically explained that the general applicability of the solicitation tax at issue there could not save it: "The fact that the ordinance is 'non-discriminatory' is immaterial. . . . A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." 319 U.S. at 115.

Likewise, in *Wisconsin v. Yoder*, which invalidated a school attendance law as applied to the Amish, the Court directly rejected a general applicability test:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability* . . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it *unduly burdens* the free exercise of religion.

406 U.S. 205, 219-20 (1972) (emphasis added).

Yet here, too, this Court's decisions reflect some tension. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that the First Amendment was not implicated by a criminal law of general applicability (a law banning peyote) when it burdened religious practices. "[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878. Four Justices rejected a categorical rule, saying "[t]here is nothing talismanic about neutral laws of general applicability." *Id.* at 901 (O'Connor, J., concurring in the judgment).

3. *Branzburg*, as noted, is emblematic of this doctrinal tension, which likely explains why the lower courts have divided over its meaning. Reaching toward one doctrinal strand, Justice White wrote that the First Amendment "does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U.S. at 682. At the same time, the opinion ultimately stopped short of ruling that general applicability is the end of the constitutional inquiry. Although the Court was unwilling to quash the press subpoenas "[o]n the records now before [it]," *id.* at 690, it also recognized that "news gathering is not without its First Amendment protections," that grand juries "must operate within the limits of the First Amendment as well as the Fifth," and that courts *should* quash press subpoenas in some cases, *id.* at 707-08. Justice Powell, who provided the pivotal fifth vote, read the majority opinion as mandating a case-by-case inquiry that strikes "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *See id.* at 709-10 (Powell, J., concurring). Under that reading, a court could exempt reporters from testifying on a case-by-case basis, based on the asserted First Amendment interest –

a view more in keeping with the line of cases that have subjected generally applicable laws to heightened scrutiny.

II. Properly Understood, the Court's Cases Reflect a Practical Approach Attuned to the Actual Burdens at Issue in Each Situation.

Amici suggest that the best way to make sense of and to reconcile these divergent opinions is to view them as reflecting a practical approach that responds to the actual burdens on First Amendment interests in each case. Where application of a general law imposes a burden on the press no greater than that imposed on any citizen, there is no need to apply heightened constitutional scrutiny. Where, however, there is a genuine threat to First Amendment values, the Court applies heightened First Amendment scrutiny even if the law is one of general applicability.[4] Secondarily, the Court also looks to whether the statutory or regulatory scheme has a built-in mechanism that can accommodate a particularized assessment of First Amendment concerns.

Cases like *Cowles Media*, in which the Court has made categorical pronouncements to the effect that generally applicable laws incidentally burdening the press do not trigger First Amendment scrutiny, are best understood as involving no real threat to the press's societal functions. *Cowles Media* itself was a civil suit against two newspapers brought by a source whose identity the newspapers had revealed after they had promised him confidentiality. The Court held that the First Amendment did not immunize the

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[4] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1210 (1996) (existing doctrine "treats substantial incidental burdens as raising a bona fide constitutional problem" but ignores insubstantial burdens); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 112 (1987) (concluding that "the Court will undertake first amendment review when an incidental restriction has a significant effect on free expression").

press from the doctrine of promissory estoppel. *Cowles Media*, 501 U.S. at 668-69. That is because application of that doctrine did not threaten newsgathering or First Amendment values. To the contrary, any restriction on the newspapers' ability to print truthful information about the informant resulted from a "self-imposed" promise. *Id.* at 671. And the press's ability to have promises of confidentiality regarded as credible clearly *aids* the newsgathering function. Rendering such promises legally unenforceable would only have impaired newsgathering.

Cowles Media fits into a line of cases holding that various regulatory laws apply to media businesses just as they apply to businesses generally. *Id.* at 669; *see, e.g.*, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977) (copyright laws); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (Sherman Act); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act). What should be clear from these cases is that none poses any real risk to First Amendment values. Requiring press enterprises to pay the minimum wage, for instance, has little to do with their reporters' ability to uncover government misdeeds, expose official action to public scrutiny, and so forth.

At the same time, this Court has also recognized that, as a practical matter, general applicability is not always a reliable indication that First Amendment values are safe. That is why, as the Court recognized in *Zurcher*, the caselaw "insist[s] that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered." 436 U.S. at 565. And it is also why the Court warned that the courts must "guard against searches of the type, scope, and intrusiveness that would *actually interfere* with the timely publication of a newspaper." *Id.* at

566 (emphasis added). Where there is a danger of "actually interfer[ing]" with freedom of the press, the Court has not been content to rely on general applicability.

Similarly, the Court's expressive conduct cases are premised on the fact that neutral laws targeting proscribable conduct can pose constitutionally relevant burdens on expression despite their generality. When a particular application of such a law creates that risk, the Constitution demands heightened scrutiny. *O'Brien*, 391 U.S. at 376-77 (law against damaging draft cards that impinged on war protests); *Clark*, 468 U.S. at 293-98 (ban on camping in parks that burdened demonstration for the homeless); *Pap's A.M.*, 529 U.S. at 289 (prohibition of public nudity that interfered with expressive dancing). As we show below, the claims of reporter's privilege at issue here fall into this category because there can be little doubt that the essential newsgathering function of the press will be compromised if reporters are routinely forced to reveal sources.

Another factor also helps to reconcile the Court's cases in this area. In assessing a First Amendment challenge to a generally applicable law, the Court has found it relevant whether some mechanism for weighing various burdens imposed by a particular enforcement of such a law already exists. The presence of a built-in mechanism that can readily accommodate consideration of First Amendment values in specific cases eases the practical difficulties of applying heightened scrutiny to a particular regulatory scheme.

For example, this factor helps to explain the different outcomes in cases like *Employment Division v. Smith* and *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Smith*, where the Court upheld application of a drug law that burdened religious practices, the Court discussed cases like *Sherbert*, which held that a state could not enforce its general rules governing unemployment benefits in a way that burdened

workers whose religion forbade work on Saturday. The Court distinguished *Sherbert* on the ground that it arose in "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884.

The *Smith* Court expressed concern that writing a religious exemption into the legislature's categorical ban on peyote use would raise practical problems *See id.* at 885. But as the Court's treatment of *Sherbert* indicates, it believed that consideration of First Amendment concerns was more workable – and thus appropriate – where the regulatory scheme already contained a mechanism for considering the burdens imposed in particular cases. As *amici* show below, this principle is relevant to the reporter's privilege because here too there already exist procedural mechanisms for quashing unduly burdensome subpoenas and discovery requests, ameliorating worries about administrability.

III. The Court Should Grant Certiorari and Enforce a First Amendment Privilege or a Comparable Common Law Privilege.

Under a rule that requires heightened scrutiny when a given application of a general law is likely to burden First Amendment rights, a subpoena seeking the identity of a confidential source would require heightened scrutiny. Compelled disclosure of confidential sources threatens the vigorous and independent press that the Framers knew was crucial to effective self-government. Moreover, the privilege can be applied without undue practical difficulties.

A subpoena demanding revelation of confidential sources poses a fundamentally different situation from cases of the *Cowles Media* variety, which involve the application of

general business and regulatory laws to press enterprises. In the *Cowles Media* line of cases, there is no serious threat to the press's journalistic functioning. (Indeed in *Cowles Media* the application of general business laws arguably *aided* the press by promoting confidential communications between sources and reporters.) Unlike labor laws, general taxes, and antitrust laws, press subpoenas put First Amendment values at risk and impose constitutionally compelling burdens.

As a threshold matter, the Court has on multiple occasions recognized that the First Amendment protects the process of gathering the news as well as publishing it. *Branzburg* itself explicitly stated that the First Amendment requires "protection for seeking out the news." *Branzburg*, 408 U.S. at 681. Protection of the newsgathering process is necessary for the common-sense reason that the press can only report what it is able to learn. As the Court emphasized in a case vindicating the press's right of access to a trial, "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980) (plurality opinion of Burger, C.J.);[5] *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (observing that the "First Amendment guarantees of a free press" forbid governmental regulation of the "crucial" editorial process).

There can be no doubt that the constitutional protection for "seeking out the news" encompasses interviewing sources, including confidential ones. *See Branzburg*, 408 U.S. at 709 (Powell, J., concurring) (explaining that under the majority opinion, journalists retain "constitutional rights

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[5] Although no opinion garnered a majority in *Richmond Newspapers*, seven of the eight participating Justices agreed that the First Amendment provided a right of access to the trial.

with respect to the *gathering of news or in safeguarding their sources*" (emphasis added)). Journalists frequently depend on confidential sources to gather news, and this is especially true with regard to the most valuable investigative stories. *See, e.g.*, John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 74 (1985) (reporting that confidential sources played "a significant role" in two-thirds of the stories nominated for Pulitzer Prizes). A press that can only reprint government statements would fail to play its important constitutional role of "keeping officials elected by the people responsible to all the people whom they were selected to serve," *Mills*, 384 U.S. at 219; *cf. Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) ("A free press cannot be made to rely solely upon the sufferance of government to supply it with information.").

Forced disclosure of confidential sources substantially hampers the protected activity of newsgathering. Justice White's majority opinion in *Branzburg* admitted that press subpoenas could lead to "consequential" burdens on newsgathering 408 U.S. at 690. And since the time of *Branzburg*, many courts have agreed with Justice Stewart's common-sense assessment that, without the protections of a reporter's privilege, "sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it," *id.* at 731 (Stewart, J., dissenting); *see, e.g.*, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (concluding that forced revelation of confidential sources "may significantly interfere with [the media's] news gathering ability"). In the district court, Petitioners submitted affidavits from themselves and prominent historians and journalists detailing the ways in which forced disclosure of confidential sources would harm their ability to inform the public on matters of great societal concern. Cooper/Time Pet. App. 123a-137a; Miller Pet. App. 108a-

114a, 165a-179a, 207a-225a. That compelled disclosure raises serious concerns is further evidenced by the judgment of the forty-nine states (plus the District of Columbia) that recognize some form of a reporter's privilege. *See* Miller Pet. App. 50a (Tatel, J., concurring in the judgment).

Recognizing a constitutionally based reporter's privilege coheres with recent trends in this Court's jurisprudence. Increasingly, the Court has begun to take a practical approach that applies varying degrees of heightened scrutiny in other contexts that – like this one – have important constitutional interests on both sides of the equation. For example, in *Turner Broadcasting System, Inc. v. FCC*, the Court invoked *O'Brien* to analyze the constitutionality of rules requiring cable systems to carry local broadcast channels. 512 U.S. 622, 662 (1994). These "must carry" rules raised First Amendment concerns because they required the transmission of certain signals, but the rules were also justified on the ground that they fostered free, over-the-air programming and promoted the multiplicity of viewpoints that is "central to the First Amendment." *Id.* at 662-64. Similarly, in *Bartnicki v. Vopper*, the Court was called upon to weigh the First Amendment value of illegally intercepted telephone calls against the privacy interests that the wiretap law promoted. 532 U.S. 514, 532-35 (2001). In neither case did the Court ignore the constitutional values on one side; rather, the Court took a practical approach attuned to the actual burdens involved. *See also Denver Area Educ. Telecomms. Consort., Inc. v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion) (explaining that the Court applies its First Amendment analysis in light of "the balance of competing interests and the special circumstances of each field of application"); *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring) ("Given these competing interests on both sides of the equation, the key question becomes one of proper fit." (internal quotation marks omitted)). The same should be true here, because "the

invocation of grand jury interests is not some talisman that dissolves all constitutional protections." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (internal quotation marks omitted).

As noted above, the Court has found it especially appropriate to subject generally applicable laws to First Amendment scrutiny when there already exists a procedural mechanism that would ease concerns about administrability. *See supra* p. 13-14. Here such a mechanism exists in the form of federal procedural rules that protect parties from unduly burdensome subpoenas and other discovery demands. *See* Fed. R. Crim. P. 17(c)(2) (permitting court to quash criminal subpoenas "if compliance would be unreasonable or oppressive"); Fed. R. Civ. P. 45(c)(3) (permitting court to quash or modify "undu[ly] burden[some]" civil subpoenas); Fed. R. Civ. P. 26(b)(2), (c) (permitting the court to grant relief from unduly burdensome discovery requests). Because these procedures already exist, the courts would not find (and have not found) great difficulty in considering First Amendment concerns along with the myriad other factors that are already being considered. Indeed, given the breadth of the considerations that can justify a restriction on discovery in the name of undue burden,[6] it would be anomalous if the First Amendment could *not* be considered when other types of arguably less significant burdens regularly are considered. As the Court stated in *Smith*, it would be improper to exclude interests protected by the First Amendment from the calculus. 494 U.S. at 884 ("[W]here

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[6] *See* 2 Charles Alan Wright, *Federal Practice and Procedure* § 275, at 262 n.25 (3d ed. 2000) (citing a sampling of cases demonstrating the variety of circumstances that can justify relief under Federal Rule of Criminal Procedure 17(c)(2)); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459, at 47-48 & n.32 (2d ed. 1995) (illustrating the "wide variety of factual contexts" that justify quashing a subpoena under Federal Rule of Civil Procedure 45(c)).

the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) (where ordinance barring killing animals contained various exceptions for "necessary" killings, religious reasons for killing animals could not be disregarded).

Further demonstrating that the reporter's privilege is readily administrable, the last thirty years have shown that the *Branzburg* majority overestimated the "practical and conceptual difficulties" involved in "defin[ing] those categories of newsmen who qualif[y] for the privilege," 408 U.S. at 704. Because most federal courts have recognized the reporter's privilege at least in some contexts, they have developed experience and expertise in dealing with such questions.[7] The tests they have employed are no less workable than other familiar inquiries such as, for example, whether material was produced in anticipation of litigation so as to qualify as protected work product. The lower courts have shown themselves more than equal to the task of administering the privilege.

Finally, even if the First Amendment did not of its own force require the reporter's privilege, the underlying constitutional concerns, and other reasons of sound policy, would support the privilege as a matter of federal common

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[7] *See, e.g., In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (holding that the privilege is applicable to persons who are "engaged in investigative reporting, gathering news, and [who] have the intent at the beginning of the news-gathering process to disseminate this information to the public"); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (holding that "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

law. In federal question cases, the courts are authorized "to define new privileges by interpreting 'common law principles . . . in light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting Fed. R. Evid. 501; alteration in original). *Branzburg* did not and could not consider the distinct authority conferred under Rule 501, which was enacted several years after *Branzburg* was decided.[8] Because *Branzburg*'s analysis concerned the First Amendment, debates over the status of the reporter's privilege have largely played out as a matter of constitutional law. But many of the same principles that require heightened scrutiny of press subpoenas under the Constitution support recognition of a common law reporter's privilege. The press plays an "essential role in our democracy," *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring), and the "free flow of information to the people" concerning the conduct of their public officials is of "*paramount* public interest." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (emphasis added). Surely this interest is at least as important as the public interest that justified the psychotherapist privilege in *Jaffee*, 518 U.S. at 11. The recognition of a reporter's privilege in forty-nine states and the District of Columbia, moreover, strongly supports the adoption of a similar federal privilege. Resolving the split in the lower federal courts by enforcing a common law privilege provides an independent reason for granting review.

CONCLUSION

The petitions for certiorari should be granted.

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[8] Even if *Branzburg* were controlling on the common law question, *see* Miller Pet. App. 22a-24a (Sentelle, J., concurring), that conclusion should be reconsidered based on the developments in First Amendment law described herein and the developments with regard to state law and the federal law of privileges discussed in the petitions.

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

The American Society of Newspaper Editors (ASNE) is a nonprofit organization founded in 1922. It has a nationwide membership of over 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,800 reporters in eighty-seven bureaus around the world, including world headquarters in New York City. Bloomberg News publishes more than 4,000 news stories each day, electronically delivering business, financial, and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional Systems, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles a year; Bloomberg Magazines, which publishes two different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

The Copley Press, Inc. is a privately held newspaper publishing company that, directly or through subsidiaries, publishes *The San Diego Union-Tribune* and nine other daily newspapers in California, Illinois, and Ohio and operates Copley News Service, an international news service.

Cox Newspapers, Inc. ("CNI") is a wholly-owned direct subsidiary of Cox Enterprises, Inc. ("Cox"). Cox, through its Atlanta Newspapers Division and CNI, publishes seventeen daily and twenty-five non-daily newspapers.

Daily News, L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000 and a Sunday circulation of more than 800,000, primarily in the New York metropolitan area.

The E.W. Scripps Company is a diverse media company with interests in newspaper publishing, broadcast television, and national television networks. The company operates 17 daily newspapers, with a combined paid daily circulation of 1.24 million; 15 broadcast television stations, including six ABC affiliates and three NBC affiliates; and five cable and satellite television programming networks and a television retailing network totaling more than 84 million subscribers.

Fox News Network, L.L.C. owns and operates the national cable news network, the "Fox News Channel," which reaches approximately 85 million subscribers in the United States. It also owns and operates the broadcast service, the "Fox News Edge," the Sunday morning political talk program, "Fox News Sunday," the website "FoxNews.com," and the national Fox News Radio Network.

Knight Ridder is the nation's second-largest newspaper publisher, with products in print and online. The company publishes 31 daily newspapers in 28 U.S. markets, with a

readership of 9.0 million daily and 12.7 million Sunday. The company's Internet operation, Knight Ridder Digital, develops and manages the company's online properties and operates Real Cities (www.RealCities.com), the largest national network of city and regional Web sites, in more than 105 U.S. markets. Knight Ridder and Knight Ridder Digital are headquartered in San Jose, California.

The McClatchy Company publishes 12 daily newspapers and 18 non-daily newspapers in California and other states, including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina, and *The Fresno Bee*. The newspapers have a combined average circulation of approximately 1,400,000 daily and 1,900,000 Sunday.

The McGraw-Hill Companies, Inc. is a multimedia publishing and information company that publishes books and magazines, including *BusinessWeek*, and also operates four local television stations.

The National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television broadcast stations. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate programming and information of all types.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The New York Press Club is an association of more than 700 members currently or formerly in the news media. The organization was established in July 1948 for the main purpose of promoting freedom of the press and secondarily to provide educational services for those entering and already in the field of journalism. The organization is headquartered in New York City and now represents members throughout the New York metropolitan area in both electronic and print media.

NYP Holdings, Inc. is the publisher of the *New York Post*, which is the longest continuously published daily newspaper in the United States, founded in 1801 by Alexander Hamilton. It is currently the seventh largest newspaper in the country with a daily readership of over 2 million. The *New York Post* has a daily circulation of 678,012 and a Sunday circulation of 467,005.

The Radio-Television News Directors Association (RTNDA) is a professional association devoted to electronic journalism. RTNDA represents local and network news executives, educators, students, and others in the radio, television, and cable news business worldwide. RTNDA's general nature and purpose is to encourage excellence in the electronic journalism industry and to work to uphold and promote the First Amendment freedoms of the news media.

Reporters Without Borders is an international press freedom organization that has been defending people's right to inform and to be informed for 20 years. It campaigns to obtain the release of imprisoned journalists, put an end to censorship, improve journalists' safety, support an independent media, and promote legal action that will bring to justice those responsible for murdering journalists.

Reuters America LLC is an indirect subsidiary of Reuters Group Plc. Founded in 1851 in London, Reuters serves the global financial markets and news media with a

wide range of information products and transactional solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and benchmarking analytics; plus news in text, video, graphics, and photographs. Some 327,000 financial market professionals working in the equities, fixed income, foreign exchange, money, commodities, and energy markets around the world use Reuters products. Reuters is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 197 bureaus around the world, serving 130 countries, and publishes approximately 30,000 headlines daily, including third party contributions, in 19 languages.

The White House Correspondents' Association was founded in 1914 and represents the White House press corps in its dealings with White House and other executive branch officials on coverage-related issues. A nine-member board of directors, elected by correspondents, addresses access to the chief executive; coverage arrangements; work space arrangements; and logistics and costs for press travel to accompany a president on the road.

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Pages
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THIS COURT SHOULD CLARIFY WHETHER AND WHEN THE FIRST AMENDMENT PROTECTS CONFIDENTIAL NEWS SOURCES FROM COMPELLED DISCLOSURE IN LEGAL PROCEEDINGS	4
A. This Court Should Resolve the Conflicts and Confusion Over the Meaning and Application of *Branzburg*	5
B. The Foundations Underlying *Branzburg* Have Shifted and a Consensus Among the States Now Favors Protection for Confidential News Sources	12
II. REVIEW IS WARRANTED TO RECONSIDER THE SUBMISSION AND CONSIDERATION OF *EX PARTE* EVIDENCE AGAINST THE REPORTERS	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Pages

Atkins v. Virginia,
536 U.S. 304 (2002). 13

Baker v. F & F Inv.,
470 F.2d 778 (2d Cir. 1972),
cert. denied, 411 U.S. 966 (1973). 6

Branzburg v. Hayes,
408 U.S. 665 (1972). ..... passim

Carey v. Hume,
492 F.2d 631 (D.C. Cir. 1974). 9

Cervantes v. Time Inc.,
464 F.2d 986 (8th Cir. 1972),
cert. denied, 409 U.S. 1125 (1973). 5

Elrod v. Burns,
427 U.S. 347 (1976). 11

Farr v. Pitchess,
522 F.2d 464 (9th Cir. 1975),
cert. denied, 427 U.S. 912 (1976). 7

Florida Star v. B.J.F.,
491 U.S. 524 (1989). 4, 13

Gonzales v. Nat'l Broad. Co.,
194 F.3d 29 (2d Cir. 1999). 6

Gratz v. Bollinger,
539 U.S. 244 (2003). 5

TABLE OF AUTHORITIES-Continued

Gregg v. Georgia,
428 U.S. 153 (1976). 10

Grutter v. Bollinger,
539 U.S. 306 (2003). 5

Hamdi v. Rumsfeld,
124 S. Ct. 2633 (2004). 15

In re Grand Jury Proceedings
(*Scarce v. United States*),
5 F.3d 397 (9th Cir. 1993),
cert. denied, 510 U.S. 1041 (1994). 7

In re Grand Jury Proceedings
(*Storer Communications, Inc. v. Giovan*),
810 F.2d 580 (6th Cir. 1987). 8

In re Grand Jury Subpoena (*Miller*),
397 F.3d 964 (D.C. Cir. Feb. 15, 2005). ..... passim

In re Grand Jury Subpoena (*Williams*),
766 F. Supp. 358 (W.D. Pa. 1991),
aff'd by an equally divided court,
963 F.2d 567 (3d Cir. 1992) (*en banc*). 6, 7

In re Guantanamo Detainee Cases,
355 F. Supp. 2d 443 (D.D.C. Jan. 31, 2005). 15

In re Shain,
978 F.2d 850 (4th Cir. 1992). 7

In re Special Proceedings,
373 F.3d 37 (1st Cir. 2004). 6

TABLE OF AUTHORITIES-Continued

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978). 4, 13

LaRouche v. Nat'l Broad. Co.,
780 F.2d 1134 (4th Cir.),
cert. denied, 479 U.S. 818 (1986). 7

Marks v. United States,
430 U.S. 188 (1977). 10

McKevitt v. Pallasch,
339 F.3d 530 (7th Cir. 2003). 8, 9-10

McKoy v. North Carolina,
494 U.S. 433 (1990). 10

Miller v. Transamerican Press, Inc.,
621 F.2d 721 (5th Cir. 1980),
cert. denied, 450 U.S. 1041 (1981). 7

New York Times v. Gonzales,
No. 04 Civ. 7677 (RWS),
2005 U.S. Dist. LEXIS 2642
(S.D.N.Y. Feb. 24, 2005). 12

Regents of Univ. of Cal. v. Bakke,
438 U.S. 265 (1978). 5, 8

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980). 4

Riley v. City of Chester,
612 F.2d 708 (3d Cir. 1979). 6

TABLE OF AUTHORITIES-Continued

Roper v. Simmons,
125 S. Ct. 1183 (March 1, 2005). 13

Silkwood v. Kerr-McGee Corp.,
563 F.2d 433 (10th Cir. 1977). 5

Shoen v. Shoen,
5 F.3d 1289 (9th Cir. 1993). 7

Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994). 13

Smith v. Daily Mail Publ'g Co.,
443 U.S. 97 (1979). 4

United States v. Burke,
700 F.2d 70 (2d Cir.),
cert. denied, 464 U.S. 813 (1983). 6

United States v. Caporale,
806 F.2d 1487 (11th Cir. 1986),
cert. denied, 482 U.S. 917 (1987),
483 U.S. 1021 (1987). 6

United States v. Cuthbertson,
630 F.2d 139 (3d Cir. 1980),
cert. denied, 449 U.S. 1126 (1981). 6

United States v. Lopez,
514 U.S. 549 (1995). 4

United States v. Moussaoui,
382 F.3d 453 (4th Cir. 2004),
cert. denied, 125 S. Ct. 1670 (March 21, 2005). 15

TABLE OF AUTHORITIES-Continued

United States v. Smith,
135 F.3d 963 (5th Cir. 1998). 7

Zerilli v. Smith,
656 F.2d 705 (D.C. Cir. 1981). 7, 9

Zurcher v. Stanford Daily,
436 U.S. 547 (1978). 10-11

OTHER

Susan Schmidt, *The When and How of Leak Being Probed: Timing of Disclosure of CIA Employee's Name a Factor in Deciding if Law Was Broken*, WASH. POST, Nov. 26, 2004. 16

Potter Stewart, *Or of the Press*,
26 HASTINGS L.J. 631, 635 (1975). 11

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protect and defend individual freedoms and individual rights guaranteed by the Constitution of the United States, including free speech rights, free press rights, privacy rights, and the freedom of association. Of particular importance to the Center in these cases is the need to vigilantly safeguard the First Amendment rights of all newsgatherers, publishers, and the public, who depend on the protection of confidential sources in gathering, publishing, and receiving news, information, and commentary.

The Center's interest in these cases stems not only from its principled commitment to protect and defend the constitutional rights of all newsgatherers, publishers, and the public, but also from the Center's practical experience as a newsgatherer, information source, and publisher, itself. As a vocal proponent of individual freedom, open government, and public accountability, the Center engages in direct-to-the-public advocacy by disseminating news, information, and commentary through a variety of media, including its own Internet website, <http://www.cfif.org>, which is updated weekly and visited by millions of readers each year. The Center's advocacy is dependent upon an ability to gather information from all types of sources, including those who require their identities remain confidential, so that the Center is able to enlarge public knowledge and encourage public discourse on matters of importance.

SUMMARY OF ARGUMENT

It is long past time for this Court — the final arbiter of the Constitution of the United States — to reconsider and clarify whether and when the First Amendment protects newsgatherers from compelled disclosure of their confidential news sources pursuant to legal proceedings. These constitutional questions of the utmost importance have confounded and divided the federal circuit courts, federal district courts, and state courts of record for more than three

decades. Indeed, given the multiplicity of conflicting rulings, newsgatherers now find they enjoy dramatically different First Amendment protections for their confidential news sources from one jurisdiction to the next, from one type of case to another, and even from federal to state courts. This arbitrary jurisprudential patchwork not only threatens the constitutional rights of newsgatherers, their confidential sources, and the public by chilling important protected speech, it also undermines the First Amendment, itself, which is supposed to be the "supreme Law of the Land" in each legal proceeding in every court across the country. Moreover, in the generations since this Court considered these constitutional questions, there has been a sea change in the protection of confidential news sources and truthful information that indicates a national consensus among the states in favor of a reporter's privilege that shields newsgatherers like the Petitioners in these cases.

Additionally, these cases warrant review because the court below upheld the contempt citations against and the imprisonment of the journalists based, at least in part, on secret evidence submitted by the prosecutor and considered by the court *ex parte*. That ruling directly conflicts with the overwhelming weight of authority from this Court and others. Indeed, even in cases that involve far more compelling and certain concerns, this Court has consistently held that, at a minimum, due process requires the opportunity to review and rebut the evidence presented before an accused can be "deprived of life, liberty, or property."

ARGUMENT

I. THIS COURT SHOULD CLARIFY WHETHER AND WHEN THE FIRST AMENDMENT PROTECTS CONFIDENTIAL NEWS SOURCES FROM COMPELLED DISCLOSURE IN LEGAL PROCEEDINGS

It is always important to "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). With respect to the freedoms of speech and of the press guaranteed by the First Amendment, this means that governmental actions that interfere with the communication of truthful information and even controversial ideas raise constitutional concerns and are inherently suspect. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The U.S. Supreme Court has noted that even when the government's authority is at its zenith, such as when the government is protecting and vindicating civil society's standards through a criminal prosecution, adverse impacts on the First Amendment rights of others cannot be disregarded or ignored. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Instead, those constitutional concerns must be taken into account when courts review the challenged state action by properly weighing the First Amendment interests at stake as an important counterbalance to the interests asserted against openness and the public's right to receive information and ideas. *See generally Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc.*, 435 U.S. 829.

These "first principles" lead to the conclusion that constitutional protections for free speech and free press, in one way or another, limit the authority of special counsel, prosecutors, criminal defendants, and civil litigants to compel newsgatherers and publishers to disclose confidential sources used in gathering and communicating news, information, and commentary to the public. The court below, however,

rejected this conclusion because the majority believed that this Court, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar." *In re Grand Jury Subpoena* (*Miller*), 397 F.3d 964, 968 (D.C. Cir. Feb. 15, 2005). Because that decision is in direct conflict with the rulings of other federal circuit courts, federal district courts, and state courts of record, not to mention a clear national consensus among the states in favor of a reporter's privilege protecting confidential news sources, this Court should grant review in these cases.

A. This Court Should Resolve the Conflicts and Confusion Over the Meaning and Application of *Branzburg*

It is definitely time for this Court to reconsider and clarify the meaning and application of *Branzburg v. Hayes*, 408 U.S. 665 (1972). As with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which this Court reconsidered and clarified two terms ago in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the *Branzburg* decision has created irreconcilable conflicts and undeniable confusion in the courts below. Today, there are no fewer than four different and inconsistent positions taken by the federal circuit courts that have interpreted *Branzburg* and decided whether and when the First Amendment provides a privilege protecting confidential news sources.[2]

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[2] Indeed, there could be more inconsistent positions on the interpretation of *Branzburg* yet to come since two circuits — the Eighth and Tenth — have yet to address whether the First Amendment offers any protection for confidential news sources in criminal proceedings. *See Cervantes v. Time Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

First, there are four circuits — the First, Second, Third, and Eleventh — that have held *Branzburg* recognized a First Amendment privilege protecting newsgatherers from the compelled disclosure of their confidential sources in all types of cases, both civil and criminal, including grand jury proceedings. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 813 (1983) (citing *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972)); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999);[3] *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *In re Grand Jury Subpoena* (*Williams*), 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987), 483 U.S. 1021 (1987).

These are the circuits that most directly conflict with the decision of the court below.[4] *Compare In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 970 ("Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing

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[3] In *Gonzales v. National Broadcasting Co.*, the Second Circuit noted that "[p]revious decisions of our court have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law," explaining that, "[u]ntil Congress legislates to modify the privilege or do away with it, . . . we need not decide whether the privilege is founded in the Constitution." 194 F.3d 29, 36 n.6 (2d Cir. 1999).

[4] This is not to mention the state courts of last resort that, likewise, have concluded that *Branzburg* and the First Amendment stand for the proposition that newsgatherers enjoy a privilege protecting their confidential sources from compelled disclosure pursuant to grand jury proceedings. *See Cooper & Time Inc. v. United States*, No. 04-1508, Pet. for Writ of Cert., at 21-22 & n.6 (citing cases) (filed May 10, 2005).

before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source."), *with In re Grand Jury Subpoena of Williams*, 766 F. Supp. at 371 ("There is a qualified news gatherer's privilege against compelled disclosure of his or her news sources in a Grand Jury proceeding."), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*).

Second, there is the interesting position of the Ninth Circuit, which has concluded that the First Amendment provides newgatherers with a privilege for the protection of their confidential sources in civil and criminal cases, but not grand jury proceedings. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) (recognizing the reporter's privilege in a civil case); *Farr v. Pitchess*, 522 F.2d 464, 467-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (applying the reporter's privilege in a criminal case); *In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397, 402 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (rejecting the reporter's privilege in the context of a grand jury).

Third, three other circuits — the Fourth, Fifth, and the court below, the D.C. Circuit — have recognized a First Amendment-based reporter's privilege in civil cases while, at the same time, concluding that *Branzburg* eliminated the possibility of such protection in criminal cases. *Compare In re Shain*, 978 F.2d 850, 852-53 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); and *In re Grand Jury Subpoena* (*Miller*), 397 F.3d 964, 970 (D.C. Cir. Feb. 15, 2005) (all rejecting a reporter's privilege in criminal proceedings); *with LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); and *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (all recognizing a reporter's privilege in civil cases).

Fourth and finally, there are the Sixth and Seventh Circuits, which have ruled that, in *Branzburg*, this Court rejected altogether a First-Amendment based privilege for newsgatherers and the protection of their confidential sources regardless of the type of legal proceeding in which the disclosure is sought. *See, e.g., In re Grand Jury Proceedings* (*Storer Communications, Inc. v. Giovan*), 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

It is evident why *Branzburg* and a First Amendment privilege protecting confidential news sources have so confused and divided the courts below. As was the case in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the meaning and application of *Branzburg* depends upon the necessary fifth vote of Justice Powell.

It is true that, unlike in *Bakke*, Justice Powell joined the majority opinion in *Branzburg*. But not only is that five-vote majority opinion far from clear in foreclosing future assertions of a First Amendment-based newsgathering privilege, *see Branzburg*, 408 U.S. at 707 ("news gathering is not without its First Amendment protections"), Justice Powell also issued a concurring opinion specifically stating that *Branzburg* "does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources," *id.* at 709 (Powell, J., concurring), and that "the courts will be available to newsmen under the circumstances where legitimate First Amendment interests require protection," *id.* at 710 (Powell, J., concurring).

Indeed, Justice Powell noted in his concurring opinion that if a newsgatherer has some "reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." *Id.* Justice Powell then

went on to explain that, in his opinion, "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," and that such a "balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* In other words, Justice Powell explicitly held that the First Amendment applied and offered at least some protection when newsgatherers face the compelled disclosure of their confidential sources in connection with legal proceedings.

The necessity of Justice Powell's vote and his concurring opinion's effect on the holding in *Branzburg* are the obvious reasons why the courts below are so hopelessly conflicted and confused. No fewer than eight of the federal circuits — including the court below in *Zerilli*, 656 F.2d at 711, and *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) — have held, at one time or the other, that Justice Powell's concurrence controls or narrows the holding in *Branzburg*. *See also Miller v. United States*, No. 04-1507, Pet. for Writ of Cert., at 17-18 (collecting cases). Strikingly, even Judge Posner, who rejected the recognition of a reporter's privilege under the First Amendment for the Seventh Circuit, noted that he was unsure whether his reading of *Branzburg* was correct:

> Although the Supreme Court in *Branzburg* . . . declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. Since the dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the

> majority opinion (for they said that his "enigmatic concurring opinion gives some hope of a more flexible view in the future"), maybe his opinion should be taken to state the view of the majority of the Justices — though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.

McKevitt, 339 F.3d at 531-32 (citations omitted).

Moreover, the confusion as to meaning and application of *Branzburg* has only been exacerbated by the fact that this Court has explained in the past that its holdings are controlled by and should be understood to be those that can or did receive the assent of at least five justices. *See McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (a concurrence "can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'").

There can be little doubt that Justice Powell intended to control or, at the very least, narrow the holding in *Branzburg*. Explaining his necessary fifth vote several years later, Justice Powell wrote:

> The concurring opinion in *Branzburg v. Hayes* . . . noted . . . that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. . . . Rather than advocating the creation of a special procedural exception for the press, it approved

> recognition of First Amendment concerns within the applicable procedure.

Zurcher v. Stanford Daily, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring).

Thus, even in spite of *Branzburg*'s result, perhaps the most plausible reading of that decision is that this Court held the First Amendment provides newsgatherers and publishers with some degree of constitutional protection against the compelled disclosure of their confidential source, even when subpoenaed by a grand jury. *See Branzburg*, 408 U.S. at 709-10 (Powell, J. concurring); *id.* at 712-13, 721-22 (Douglas, J., dissenting); *id.* at 736-38, 743 (Stewart, Brennan, Marshall, JJ., dissenting). Or perhaps, as Justice Stewart commented in a law journal article, *Branzburg* was a stalemate in which this "Court rejected the [reporters'] claims . . . by a vote of four and a half to four and a half." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 635 (1975).

In either case, it goes almost without saying that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the current arbitrary patchwork of varied First Amendment protections for confidential news sources surely does not adequately secure the freedoms of speech and of the press. Indeed, both Petitioner Judith Miller and Respondent Special Counsel Patrick Fitzgerald know well that newsgatherers enjoy widely differing constitutional protections for their confidential sources depending solely upon the jurisdiction in which their discovery is sought. *Compare In re Grand Jury Subpoena (Miller)*, 397 F.3d at 970 (upholding a contempt citation against Ms. Miller because "the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence

promised by the reporter to any source"); *with New York Times v. Gonzales*, No. 04 Civ. 7677 (RWS), 2005 U.S. Dist. LEXIS 2642 (S.D.N.Y. Feb. 24, 2005) (recognizing a reporter's privilege under the First Amendment and common law that protects Ms. Miller's confidential sources and telephone records). Such arbitrary First Amendment protection is not constitutionally acceptable, and this Court should grant review to resolve these conflicts.

B. The Foundations Underlying *Branzburg* Have Shifted and a Consensus Among the States Now Favors Protection for Confidential News Sources

Although the federal circuit courts are much conflicted as to whether and when newsgatherers enjoy a constitutional privilege protecting their confidential sources from compelled disclosure in legal proceedings, the states are unanimous in embracing some sort of reporter's privilege, with the sole exception of Wyoming, which has not considered the issue. *See Miller v. United States*, No. 04-1507, Pet. for Writ of Cert., at 23-24, n.21 & 22 (collecting state statutes and cases establishing a reporter's privilege). In fact, the concurring opinion of Judge Tatel below recognized "that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources." *In re Grand Jury Subpoena (Miller)*, 397 F.3d at 993 (Tatel, J., concurring).

As Judge Tatel observed, "Denial of the privilege, then, would . . . buck the clear policy of virtually all the states," and, "[i]nsofar as *Branzburg* relied on the 'great weight of authority' to discern the First Amendment's meaning, the shift in favor of the privilege since that time — from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection — could provide a basis for rethinking *Branzburg*." *Id.* at 993, 994 (Tatel, J., concurring).

Indeed, earlier this term, this Court did just that in an Eighth Amendment case, reconsidering and reinterpreting the constitutional prohibition against "cruel and unusual punishment" with far less consensus among the states. *See Roper v. Simmons*, 125 S. Ct. 1183, 1192 (March 1, 2005) (reinterpreting the Eighth Amendment to bar imposing capital punishment on juveniles after finding that 30 states prohibit the juvenile death penalty); *see also Atkins v. Virginia* 536 U.S. 304, 306-07 (2002) (also reinterpreting the Eighth Amendment to bar the execution of the mentally retarded after finding that 30 states had rejected the practice).

Even if it were true in 1972 "that the great weight of authority [wa]s that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *Branzburg*, 408 U.S. at 685, the same is no longer true in 2005. It is quite the opposite. In more than three decades since this Court decided *Branzburg*, it has become the all but unanimous position of the states that newsgatherers should enjoy protection for their confidential sources against compelled disclosure in legal proceedings. This national consensus among the states developed at the same time as this Court granted greater constitutional protection to speech of all kinds, requiring that even generally-applicable laws survive heightened scrutiny when they burden asserted First Amendment interests. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). Moreover, over the same time period, this Court has been extraordinarily careful to ensure that government does not interfere with the gathering, communication, and dissemination of truthful speech and information, such as the very reporting and publishing targeted by the subpoenas in these cases. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

This national consensus among the states along with the steady and consistent development and extension of robust

First Amendment protections leads to a single conclusion — that newsgatherers are entitled to at least some constitutional protection for their confidential sources. This Court should grant review in these cases to reconsider whether the First Amendment provides that protection consistent with the consensus that has emerged from the states and the advances in this Court's First Amendment jurisprudence.

II. REVIEW IS WARRANTED TO RECONSIDER THE SUBMISSION AND CONSIDERATION OF *EX PARTE* EVIDENCE AGAINST THE REPORTERS

Perhaps the most surprising and objectionable part of the decision below was the court's willingness to uphold the contempt citations against and possible imprisonment of the Petitioners based upon evidence neither they nor their counsel were allowed to examine or afforded the opportunity to rebut. In fact, all three judges below ruled "that if [the reporter's] privilege applies here, it has been overcome," and then explained that "the reasons [were] set forth in the separate opinion of Judge Tatel." *In re Grand Jury Subpoena (Miller)*, 397 F.3d at 973. But while "the reasons" may have, in fact, been "set forth" in Judge Tatel's concurring opinion, *id.*, any reader — including Petitioners Judith Miller, Matthew Cooper, Time Inc., and their counsel — other than the judges and the Special Counsel would never know because those findings were redacted — all eight pages of them. *See id.* at 1002 (Tatel, J., concurring). Thus, Petitioners not only had to take the word of the court below that the judges did "ensure that the special counsel ha[d] met his burden demonstrating that information is both critical and unobtainable from any other source," but the Petitioners also never had the opportunity to review or rebut the evidence submitted and considered against them. *Id.* Such an *ex parte* procedure not only offends constitutional common sense, but

also fails to meet the most minimal requirements of due process regardless of the countervailing interests at stake.

Notably, a plurality of this Court ruled just last term in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), that even alleged enemy combatants are entitled to greater due process with regard to knowledge of and challenge to the adverse evidence than Petitioners received in both the court below and the district court. Specifically, this Court concluded in *Hamdi*, that an enemy combatant was due, at a minimum, "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id.* at 2648. Indeed, other courts have held that an accused's opportunity to review, challenge, and rebut evidence introduced to "deprive" him of "life, liberty, or property" is fundamental to any minimal due process standard, even when that evidence is classified based on national security concerns. *See, e.g.*, *United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (March 21, 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. Jan. 31, 2005). As a result, in cases like the criminal prosecution of Zacarias Moussaoui, the government has been required to offer either the defendant or his counsel who have proper security clearance the opportunity to examine the evidence submitted against him.

The interests on the side of secrecy in these cases do not come close to the compelling and certain risks raised by the evidence in the enemy combatant and terrorism-related cases that this Court and others have held to be subject to an accused's review, challenge, and rebuttal. Moreover, reports of the Special Counsel's investigation have gone so far as to suggest that it is possible — if not likely — that the disclosure of Valerie Plame's classified identity as a CIA

operative did not violate any criminal laws, meaning the importance of the investigation is comparatively low. *See, e.g.*, Susan Schmidt, *The When and How of Leak Being Probed: Timing of Disclosure of CIA Employee's Name a Factor in Deciding if Law Was Broken*, WASH. POST, Nov. 26, 2004, at A6 (noting "[t]o constitute a violation of the Intelligence Identities Protection Act, a disclosure by a government official must have been deliberate, the person doing it must have known that the CIA officer was a covert agent, and he or she must have known that 'the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States,'" and explaining that "[i]f White House aides directed reporters to information that had already been published by [columnist Robert] Novak, they may not have disclosed classified information").

Given these circumstances, surely the Petitioners were due at least the minimal amount of process that this Court and others have granted to not only American citizens but even foreign enemy combatants. As a result, this Court should grant review in these cases in order to remedy the obvious and egregious constitutional due process errors committed by the court below.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for writs of certiorari.

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IN THE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITIONS	3
I. THE LACK OF A FEDERAL REPORTER'S PRIVILEGE UNDERMINES THE LEGISLATIVE AND JUDICIAL DETERMINATIONS OF FORTY-NINE STATES AND THE DISTRICT OF COLUMBIA	3
II. CHANGES IN THE STATE LAW LANDSCAPE IN THE THIRTY YEARS SINCE *BRANZBURG* AND THE ENACTMENT OF RULE 501, AND THE DISARRAY IN THE CIRCUITS, MAKE THE ISSUE RIPE FOR DECISION BY THIS COURT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Branzburg v. Hayes, 408 U.S. 665 (1972) ..... *passim*
Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) 7
Funk v. United States, 290 U.S. 371 (1933) 6
Higgins v. Young, No. 97CVD563, 2001 WL 1692379 (N.C. Super. Ct. Aug. 8, 2001) 4
In re Letellier, 578 A.2d 722 (Me. 1990) 3
Jaffee v. Redmond, 518 U.S. 1 (1996) 3, 5, 6, 7
McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003) 7
New York Times Co. v. Gonzales, No. 04 Civ. 7677(RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005, as amended Mar. 2, 2005) 5
Pearson v. Miller, 211 F.3d 57 (3d Cir. 2000) 6
Scarce v. United States (In re Grand Jury Proceedings), 5 F.3d 397 (9th Cir. 1993) 7
Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) 7
Trammel v. United States, 445 U.S. 40 (1980) 5, 6
United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986) 7
United States v. Gillock, 445 U.S. 360 (1980) 6
Upjohn Co. v. United States, 449 U.S. 383 (1981) 7

Statutes:

D.C. Code Ann. §§ 16-4701-16-4704 6
N.C. Gen. Stat. § 8-53.11(c) 4
Neb. Rev. Stat. Ann. § 20-144 4

Federal Rules of Evidence:

Rule 501 ..... 3, 5, 6, 8

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INTEREST OF *AMICI CURIAE*

The thirty-four *Amici* States and the District of Columbia, each of which appears in this Court through its respective

Attorney General, recognize some form of a "reporter's privilege" through either legislation or judicial decision. The privilege protects journalists from compelled disclosure of information obtained from confidential sources. In applying the privilege, most States employ a balancing test that weighs the public interest in protecting reporters' newsgathering and the free flow of information against the relevance of the information, the availability of alternative sources and the public interest in compelling disclosure.

These "shield laws," like those of the other fifteen states that have them, share a common purpose: to assure that the public enjoys a free flow of information and that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest.

As Judge Tatel noted in his concurring opinion in the court of appeals, there has been a "shift in favor of the [reporter's] privilege" among the States since this Court last addressed the issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection." Pet. App. 59a.[1] The statutes and judicial decisions of the fifty jurisdictions that fueled this "dramatic growth in support for the reporter privilege," *id.* 61a, are collected in the Miller Petition (No. 04-1507) at 23 nn.21-22.

The decision below – in which the court of appeals declined to fashion *any* corresponding federal reporter's privilege – conflicts with the recognition of such a privilege by virtually every State and the District of Columbia. A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and

[1] The fiftieth State, Wyoming, has yet to address the issue.

protect "buck[s] the clear policy of virtually all states," Pet. App. 58a (Tatel, J., concurring), and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them. *Cf. Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).[2]

The *Amici* States also have a vital interest in this issue independent of protecting the integrity of their shield laws. Uncertainty and confusion – exemplified by the split in the federal courts of appeals and by the fractured panel opinions below – have marked this area of the law in the three decades that have passed since this Court decided *Branzburg* and the Congress enacted Rule 501 of the Federal Rules of Evidence. This increasing conflict has undercut the State shield laws just as much as the absence of a federal privilege.

REASONS FOR GRANTING THE PETITIONS

I. THE LACK OF A FEDERAL REPORTER'S PRIVILEGE UNDERMINES THE LEGISLATIVE AND JUDICIAL DETERMINATIONS OF FORTY-NINE STATES AND THE DISTRICT OF COLUMBIA

Forty-nine States and the District of Columbia recognize some form of reporter's privilege.[3] The scope of the privileges varies, but all rest on a legislative or judicial determination that an informed citizenry and the preservation of news information sources are of vital importance to a free

---

[2] *Amici* take no position on whether such a privilege would cover the communications at issue in this case, or on the Fifth Amendment questions presented in the Petitions for Certiorari.

[3] Some have done so by statute and others by judicial decision; some privileges are absolute, but most are qualified; most jurisdictions use the "privilege" label; others, such as Maine, employ the case-by-case balancing test approach outlined in Justice Powell's concurring opinion in *Branzburg*, 408 U.S. at 709-10. *See In re Letellier*, 578 A.2d 722, 725-27 (Me. 1990).

society. Without such a privilege, reporters in those States would find their newsgathering abilities compromised, and citizens would find themselves far less able to make informed political, social and economic choices.

The determinations made by Nebraska and North Carolina typify those of the other forty-eight jurisdictions. As the Nebraska Legislature found, a shield law vindicates the State's policy of "insur[ing] the free flow of news and other information to the public," and guaranteeing that "those who gather, write, or edit information for the public or disseminate information to the public . . . perform these vital functions only in a free and unfettered atmosphere." Neb. Rev. Stat. Ann. § 20-144. Moreover, "compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public." *Id.*

In North Carolina, the reporter's privilege likewise is intended

> to protect the free flow of information and avoid the impediment that occurs when reporters are subjected to in-court examination of their newsgathering activities. . . .
>
> . . . The compelled production of a reporter's resource materials and testimony can constitute a significant intrusion into the newsgathering and editorial processes and may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the reporter's privilege.

Higgins v. Young, No. 97CVD563, 2001 WL 1692379, at *2 (N.C. Super. Ct. Aug. 8, 2001) (unpublished opinion) (citing N.C. Gen. Stat. § 8-53.11(c)).

The lack of a corresponding federal reporter's privilege undermines these vital State interests. Without it,

> the degree to which confidential sources could be protected would be rendered uncertain, thereby lessening the likelihood that such sources will cooperate and undercutting the very benefit to the public that . . . many . . . states . . . sought to bestow through [their] shield law[s].

New York Times Co. v. Gonzales, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *41 (S.D.N.Y. Feb. 24, 2005, as amended Mar. 2, 2005).

To quote Judge Tatel, continued denial of a federal reporter's privilege would "'frustrate the purposes of the state legislation' by exposing confidences protected under state law to discovery in federal courts." Pet. App. 57a (quoting *Jaffee*, 518 U.S. at 13).

II. CHANGES IN THE STATE LAW LANDSCAPE IN THE THIRTY YEARS SINCE *BRANZBURG* AND THE ENACTMENT OF RULE 501, AND THE DISARRAY IN THE CIRCUITS, MAKE THE ISSUE RIPE FOR DECISION BY THIS COURT

Rule 501 of the Federal Rules of Evidence "did not freeze the law governing the privileges of witnesses in federal trials," but instead directed the "federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). The federal courts are to do so "by interpreting 'common law principles . . . in the light of reason and experience.'" *Id.* at 8 (quoting Rule 501) (alteration in original). In deciding whether that "evolutionary development" has reached the point where "reason and experience" make it appropriate to define a new testimonial privilege,

State precedent and the existence of a consensus among the States are of particular importance. *Id.* at 12-13.

As this Court observed in *Jaffee*, the "policy decisions of the States bear on the question whether federal courts should recognize a new privilege." *Id.* (citing *Trammel*, 445 U.S. at 48-50; *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980)). Because State legislatures "are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 13. The case for the privilege is even stronger where, as here, "the information sought is protected by a state privilege." *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000).[4]

Here, as in *Jaffee*, a "consistent body" of policy determinations by State legislatures reflects both "reason" and "experience." *Jaffee*, 518 U.S. at 13 (citing *Funk v. United States*, 290 U.S. 371, 376-81 (1933)). And, again as in *Jaffee*, the history of the reporter's privilege shows that in the years since *Branzburg* and the enactment of Rule 501, the States' lawmakers moved quickly to adopt the reporter's privilege, as they "rapidly recognized the wisdom" of such a privilege. 518 U.S. at 14.

To be sure, the States' shield laws and judicially crafted reporter's privileges vary in scope and exceptions. But all State *Amici* agree that some form of a reporter's privilege grounded in federal common law is appropriate, and the majority of States have adopted a balancing test approach akin to that suggested by Judge Tatel. *See* Pet. App. 62a-72a. Because "confidential sources are essential to the workings of the press—a practical reality that virtually all states and the

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[4] If this matter had involved a District of Columbia, instead of a federal, grand jury, the District of Columbia shield law (D.C. Code Ann. §§ 16-4701-16-4704) would have protected Petitioners.

federal government now acknowledge," the *Amici* States, like Judge Tatel, believe that "'reason and experience' compel recognition of a privilege for reporters' sources." Pet. App. 84a-85a.[5]

The consensus among the States on the reporter's privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. For example, the Eleventh Circuit holds that the privilege exists in both criminal and civil cases,[6] the Ninth Circuit applies the privilege in the civil[7] and criminal[8] trial contexts, but not in the grand jury context,[9] and the Seventh Circuit concludes[10] that there is no privilege at all.[11] These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an "'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Jaffee*, 518 U.S. at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

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[5] *Amici* take no position at the Petition Stage on the precise form and scope of such a privilege.

[6] *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

[7] *Shoen v. Shoen*, 5 F.3d 1289, 1295-96 (9th Cir. 1993).

[8] *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975).

[9] *Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397, 401-02 (9th Cir. 1993).

[10] *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

[11] These divergent approaches are canvassed at length in the Miller Petition (No. 04-1507) at 13-19 and the Cooper/Time Petition (No. 04-1508) at 14-16, 22-23.

CONCLUSION

The present confusion and lack of clarity as to the existence and the scope of a federal reporter's privilege, three decades after *Branzburg* and Rule 501, disserve the public, sources and reporters in every State. A decision in this case by this Court, definitively resolving the question of a reporter's privilege, "will provide critical guidance in similar situations in the future." Pet. App. 53a (Tatel, J., concurring). Accordingly, "[f]or the sake of reporters and sources whom such litigation may ensnare," this Court "should take this opportunity to clarify the rules governing their relationship," *id.*, by granting the Petitions.

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